82-1181

Supreme Court, U.S.
FILED
JAN 19 1983
ALEXANDER L. STEVAS
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD ALLEN JAMES,

Petitioner,

v.

DISTRICT OF COLUMBIA COURT OF APPEALS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED*

I. Can a Court of Appeals, which has the ultimate responsibility for disciplining attorneys, refuse to consider due process deprivations because of an accused's failure to raise those deprivations before the fact finding advisory tribunals acting under a delegation of authority from the Court of Appeals?

II. What actions must an attorney take in a quasi-criminal administrative proceeding to preserve his arguments before the ultimate adjudicating authority, that he has been denied his right to receive prior notice of the charges against him and an opportunity to be heard?

III. Where the rules governing disbarment proceedings provide that an attorney has the right to be heard in mitigation, is the attorney deprived of due process when he is informed prior to the hearing that he would be afforded a second hearing to present such mitigation evidence and then is refused that opportunity without notice?

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* The parties below were Richard Allen James, petitioner herein, and the Office of the Bar Counsel of the District of Columbia.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RICHARD ALLEN JAMES,

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DISTRICT OF COLUMBIA COURT OF APPEALS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Richard Allen James, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered in the above-entitled case on October 21, 1982.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported in 452 A.2d 163 and is printed in Appendix A, *infra*, page 1a. The Report and Recommendation of the District of Columbia Court of Appeals Board on Professional Responsibility is printed in Appendix B, *infra*, page 16a. The Report of Hearing Committee Number Nine of the Board on Professional Responsibilty is printed in Appendix C, *infra*, page 39a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on October 21, 1982. No petition for rehearing was filed in that Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The disciplinary rules of the American Bar Association's Code of Professional Ethics have been incorporated into the District of Columbia Court of Appeals by Rule

XI, § 2. The disciplinary rules at issue herein are: DR 1-102(A)(4), DR 1-102(A)(5), DR 1-105(A)(4), DR 5-104(A), DR 6-101(A)(3), DR 7-101(A)(1), (2), and (3) and DR 9-102(A). Also involved is District of Columbia Court of Appeals Rule XI, § 7(2). The texts of the disciplinary rules and court rule are set forth in full in Appendix C, *infra*, page 67a.

STATEMENT OF THE CASE

This is a bar disciplinary proceeding in which the District of Columbia Court of Appeals confirmed the Board on Professional Responsibility's ("the Board") findings that the petitioner, Richard Allen James ("James"), had violated several disciplinary rules and accepted the Board's recommendation that he be suspended from the practice of law in the District of Columbia for two years. Prior to these proceedings, James had practiced in the District of Columbia for approximately ten years and had an unblemished record.

The disciplinary proceedings against James involved his representation of clients in two different cases. However, the discipline recommended by the Board was premised on the Board's findings with respect to one of those cases, his representation of Louvenia A. Coverdale ("Coverdale"). Since the issues presented for review in this petition relate only to the Coverdale case, only its facts will be summarized here.

In September, 1978 Coverdale retained James to represent her in defending a personal injury case brought against her by James Stevenson ("Stevenson"), who claimed to have been injured in a building owned by Coverdale and in which he was a tenant. In October, 1979 the parties reached an agreement in which Mrs. Coverdale agreed to pay Stevenson $1,250 within 15 days

and the suit was dismissed. James billed Mrs. Coverdale $1,500 for his services in the case. No issue has ever been raised regarding the reasonableness of those fees. Coverdale, however, was unable to satisfy the settlement within the required time and Stevenson refused to accept payment in installments. Coverdale then sent James a series of checks beginning with a check for $350 on November 3, 1979. The first check contained a notation on its face indicating that $300 was for James' fee and $50 was for the settlement. (Hearing Committee Report, Appendix C, page 42a.) James called Coverdale and told her that Stevenson had rejected the installment payment proposal. (Hearing Committee Report, page 4; Appendix C, page 42a.) Coverdale then sent James three checks for $400 each in December, 1979, January and February, 1980. The December and January checks contained no notations as to how they should be allocated. The February check contained a notation indicating that it was for both James' fee and the settlement. James deposited the February check in his escrow account.

James' and Coverdale's testimony differed as to how they had agreed to allocate the payments between the settlement and James' fee. James testified that he had explained to Mrs. Coverdale that installment payments were unacceptable to the plaintiff and that the plaintiff would seek to set aside the settlement. He therefore applied the first three checks to his fee and deposited the last one in his escrow account. (Hearing Transcript, page 169.) He also testified that even if he were to have understood that Mrs. Coverdale wanted him to use the checks to cover the settlement, he could not have made the payments because the plaintiff had no fixed address or attorney in the record. (Hearing Transcript, page 170.) Coverdale testified that she thought James had

agreed to pay off the settlement first and she then would pay him. (Hearing Transcript, page 130.)

Stevenson's original attorney had withdrawn from the case because he believed that Stevenson was dishonest and manipulative in trying to overturn the settlement. (Respondent's Exhibit 4.) James testified that in December, 1979 he had received a call from a person identifying himself as Stevenson's new lawyer who claimed that the settlement was supposed to be $12,500 not $1,250. (Hearing Transcript, page 158; see also Hearing Committee Report, page 5, Appendix C, page 181.)

The Board found that James was obligated to apply the checks first to the settlement until it was satisfied and then to his fee, even though he had no place to send them and no one to accept the payments.

In February, 1980 Stevenson through his new counsel filed a motion in the Superior Court for the District of Columbia to set aside the settlement. Argument on plaintiff's motion was held on April 30, 1980. During this argument Stevenson's counsel took the position that, since the settlement had not been paid within the required 15 days, the settlement agreement had been breached and the case should be reinstated. James informed the Court that Coverdale had been unable to pay the judgment on time, that she had been sending him money, that he had been keeping the balance over his fee in an escrow fund, that the amount in the escrow fund was about $350 (it was in fact $400) and that Mrs. Coverdale had not made a payment in three months on his advice after receipt of Stevenson's motion (actually the payments were suspended for only two months). The court at first indicated that it would be inclined to deny the motion if Coverdale would pay the settlement immediately. James asked for 15 days to speak to his client

and arrange for her payment, and even offered to satisfy the settlement out of his fee if necessary. He explained that the settlement had not been paid before because of the difficulty in locating the plaintiff. Stevenson's counsel argued that James' offer was already too late since the settlement agreement had been breached when Coverdale had not made timely payment. The Court granted the plaintiff's motion.

The District of Columbia Bar Rules, as adopted by the District of Columbia Court of Appeals, provide that disciplinary proceedings are initiated by Bar Counsel by a petition which is filed with the Board and served on the accused. The petition "shall be sufficiently clear and specific to inform the respondent of the alleged misconduct." (Rule XI, § 7(2), Appendix D, page 68a.) After the accused files an answer with the Board, the matter is assigned to a hearing committee, consisting of three members which, if issues of fact are raised by the pleadings, must hold a hearing including a hearing with respect to mitigation of sanctions. At the hearing the accused is entitled to be represented by counsel, to cross examine witnesses, and to present evidence. Following the hearing, the committee submits a report with findings and recommendations to the Board. The Board receives briefs from the parties, hears oral argument and either affirms or modifies the recommendation of the hearing committee. The Board submits a report with its findings and recommendations to the Court of Appeals. If the accused filed exceptions to the Board's Report, the Court schedules briefs and oral argument. Upon conclusion of the proceedings, the Court of Appeals enters an order. The Court of Appeals accepts the Board's findings unless they are unsupported by substantial evidence and adopts the Board's recommended sanctions unless inconsistent with prior dispositions for comparable conduct. The

Court of Appeals is the ultimate deciding authority. It is the Court which issues the order of disbarment or suspension. The Board and Hearing Committee are merely advisory bodies to the Court. (Rule XI, § 7, Appendix D, page 67a.)

The investigation into James' representation of Mrs. Coverdale began on February 5, 1980, in response to Stevenson's complaint to the Bar Counsel. On July 16, 1980, the Petition in the matter was served on James. Among other charges, the Petition alleged that James had "violated Disciplinary Rule 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice as alleged in paragraph 7."

Paragraph 7 set out the specific conduct on which this charged was based:

> (7) On February 29, 1980, plaintiff [Stevenson] filed a Motion for Relief from Order requesting the Court to set aside the settlement entered on October 15, 1979 and permit the plaintiff to proceed to trial. *In opposing this motion on behalf of Ms. Coverdale, respondent represented to the Court that he had been unaware of the plaintiff's whereabouts. That statement was false and respondent knew or should have known that it was false.*

(Emphasis added.)

The only hearing in the disciplinary proceedings was held on December 16, 1980. James appeared *pro se.* On page 164 of a 207 page transcript, the Hearing Committee Chairman raised a new issue:

> CHAIRMAN: Mr. James, *I have a deeper concern about this case.* You appeared before Judge Fauntleroy on April 30, 1980, on a motion to reopen the record on the grounds that a settlement had not been paid.

MR. JAMES: That's right.

CHAIRMAN: By that time, you had received four checks from Mrs. Coverdale totaling an amount of $1,550, excluding your retainer, payments made after the settlement was made by Mrs. Coverdale, and the evidence of three of those checks is in the record here, and the fourth we will agreed was paid.

I notice nowhere in your argument to the Court that you ever advised the Court that Mrs. Coverdale paid any money. The clear impression that the Court must have had, as I did, when I read the transcript of that hearing, was that Mrs. Coverdale had reneged on her obligation.

MR. JAMES: I would like to read that.

CHAIRMAN: I suggest that you do so. I don't want to waste time in the hearing now, but in your brief that follows this case, memorandum, if you choose to file one, I would like you to focus on that question.

MR. JAMES: Now, what's the question?

(Hearing Transcript, pages 164-65, emphasis added.)

This exchange was the first time that James was on notice that other matters addressed at the motions hearing were of interest to the Committee and even then he was not informed that his statements to Judge Fauntleroy with respect to the payments made by Mrs. Coverdale might form the basis of discipline.

In their reports the Hearing Committee and the Board pointed to this conduct at the hearing as the basis for finding a violation of DR 1-102(A)(5). The Committee explicitly declined to decide whether the conduct originally charged—James' representation to the Court that he was unaware of plaintiff's whereabouts—was a violation. (Report of Hearing Committee, Appendix C,

page 56a.) The Committee and the Board found that Respondent failed to advise the Court that Mrs. Coverdale's total payments to Respondent were sufficient to satisfy the settlement, that she had not made a payment in three months at his suggestion and that James stated that she was unable to pay faster because of financial difficulties. According to the Committee and the Board these statements were evasive and deceptive and constituted conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). To date, James has never been charged with that conduct.

The charge that James misled the Court was a major factor in the severity of the sanction imposed. "In our view, however, Respondent seriously compounded his wrongdoing by the evasions and misrepresentations he engaged in with the court and his client. . . ." (Board on Professional Responsibility Report at 22, Appendix B, at 37a.)

On December 9, 1980 and prior to the hearing, the Chairman of the Hearing Committee wrote to the parties instructing them that the issue of appropriate discipline would be deferred to a later date, after the determination of the question of liability. (Appendix F, page 82a.) In reliance on that instruction, James was not prepared to present any evidence as to mitigation. However, at the close of the hearing the Chairman asked James if he had any mitigation evidence to present. James indicated that he would like to bring in character witnesses but the Chairman decided that any mitigation material could only be presented in James' post-hearing memorandum.

In his post-hearing memorandum, James specifically requested that, if the Committee should find against him as to liability, he be provided with the opportunity of

a mitigation hearing which the Chairman's December 9, 1980 letter had indicated he would receive. He proffered that such evidence would include the following: "(a) mitigating circumstances; (b) petitioner's prior good record and lack of disciplinary complaints; (c) petitioner's previous good reputation as an attorney; (d) the absence of evil or fraudulent intent related to any disciplinary infraction; and (e) respondent's willingness to admit any negligence or wrongdoing if such were found by [the] Committee."

In response to that request, in a letter to James' newly obtained counsel dated February 20, 1981, the Chairman of the Hearing Committee denied James the right to have a hearing as provided for in the Rules, the Petition and the Chairman's December 9 letter, provided 15 days for James to provide written materials concerning prior record and reputation (Items (b) and (c)); and denied him the right to further address the other three areas of proffered evidence. (A copy of that letter is attached hereto as Appendix F, page 86a.) In his Exceptions to the Board's Report, James again raised the issue of his opportunity to present mitigation evidence.

The report of the Hearing Committee, which first recommended a sanction based upon conduct not contained in the charges, was not issued until after both the hearing and James' post-hearing briefs. Thus, James had no opportunity to raise at the hearing committee level his right to notice. James first raised the issue with respect to whether his due process right to notice was violated in his brief before the Court of Appeals, after the Board had issued its recommendations. The Court of Appeals held that James' failure to raise this issue at both the Hearing Committee and Board levels constituted a

waiver of that issue and declined to resolve the merits of the claim that he was deprived his due process right to prior notice of the charge against him and the opportunity to defend against that charge.

REASONS FOR GRANTING THE WRIT

I.

THOUGH THIS COURT IN *IN RE RUFFALO* HAS RULED THAT AN ACCUSED IN AN ATTORNEY DISBARMENT PROCEEDING IS ENTITLED TO FAIR NOTICE OF THE CHARGES AGAINST HIM AND AN OPPORTUNITY TO DEFEND AGAINST THOSE CHARGES, THIS COURT HAS NEVER ADDRESSED WHAT PROCEDURES AN ACCUSED MUST TAKE TO PRESERVE THOSE RIGHTS BEFORE ADMINISTRATIVE TRIBUNALS

In 1968, this Court held that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which include fair notice of the charge." *In re Ruffalo*, 390 U.S. 544, 550 (1968). In the instant case, James was served with notice that he had violated DR 1-102(A)(5) (conduct prejudicial to the administration of justice) when he represented to the Motions Judge of the District of Columbia Superior Court that he did not know Stevenson's address.

James was found to have violated DR 1-102(A)(5), not because of the conduct for which he was charged, but because he allegedly misrepresented to the Superior Court the amounts, nature and circumstances surrounding the receipt of payments from Coverdale. To date, he has never been found guilty of the offense charged—misrepresenting to the Court his knowledge of Stevenson's

address—and has never been officially charged with the offense of which he was actually found guilty—misrepresenting the circumstances surrounding Coverdale's payments. *Ruffalo* held that such a procedure violates due process:

> [T]he charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.

Id. at 541 (footnote omitted).

In *Ruffalo* the charges were formally amended and Ruffalo had several months to respond to the new charge. In this case, the charges were never amended and James has never had any opportunity to be heard on the new charge.

The first suggestion that other matters discussed in the motions argument might be at issue arose about three-quarters through the disciplinary hearing when the Chairman rather vaguely remarked that he had a "deeper concern" about the case. The Chairman went on to mention James' failure to advise the Court that Coverdale had paid any money but did not mention any of the other areas in which James was eventually found to have misled the Court. James was not on notice that an additional charge was being made.

Rather than address the due process deprivation which this Court recognized in *Ruffalo*, the District of Colum-

bia Court of Appeals held that by James' failure to raise the issue at the Hearing Committee or the Board level he ". . . waived his right to have this isssue resolved in this case." (Appendix A at 12a.)

This decision is contrary to the implied but not expressed holding of *Ruffalo*. While the opinion of the Court did not address the issue of waiver, Justice White's concurring opinion explicitly declined to consider the due process notice issue because Ruffalo had not raised it either in the Sixth Circuit or in this Court. *In re Ruffalo*, 390 U.S. 544, 553. While the Court's opinion did not explicitly discuss Justice White's objection, it appears that the Court addressed the merits of the due process issue because the failure to notify the accused of the charge for which he may be punished is a fatal due process defect and that a hearing based on charges of which the accused is not on notice is no hearing at all. *Id.* at 549-51.

This Court has held that before one can be found to have waived a fundamental constitutional right his waiver must be both knowing and intelligent. *Gardner v. Florida*, 430 U.S. 349 (1977); *Henry v. Mississippi*, 379 U.S. 443 (1965); *Fay v. Noia*, 372 U.S. 391 (1963). In this case, James has never been given notice of the exact conduct for which he was found to have violated DR 1-102(A)(5) and, therefore, without such notice, could not be said to have knowingly waived his right to notice of the charges against him.

If the District of Columbia Court of Appeals' decision is permitted to stand, then this Court's holding in *Ruffalo* will become meaningless. By finding that an attorney violated a Disciplinary Rule through conduct which was not contained in the original charge, and

which was never the subject of an amended charge, the Court of Appeals has left the accused to not only guess at the conduct for which he may have to answer, but also to anticipate that the Hearing Committee and Disciplinary Board will discipline him for conduct for which he was never charged.

The "trap" which this Court described in *In re Ruffalo*, 390 U.S. 544, 551, becomes no less a trap simply because the accused does not know what ensnared him until after the harm has been committed and his right to due process had been denied.

This Court has recognized that the issue of whether there has been a waiver of a federal right is a federal question, *Henry v. Mississippi*, 379 U.S. 443 (1965). It has not, however, addressed the issue of whether failure to raise a *Ruffalo* defect constitutes a knowing and intelligent waiver, particularly in a situation where the charges and specifications were never amended to reflect the new charge. This constitutional issue which was not explicitly resolved by this Court's decision in *Ruffalo* needs to be answered and requires this Court's resolution.

II.

WHETHER AN ACCUSED IN A QUASI-CRIMINAL PROCEEDING HAS A DUE PROCESS RIGHT TO A HEARING AT WHICH HE CAN PRESENT MITIGATION TESTIMONY IS A QUESTION WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT

It is well established in criminal cases that the sentencing process as well as the trial itself must satisfy the requirements of the due process clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). While this Court has never clearly delineated the form of procedure required by due process in sentencing proceedings either in criminal or quasi-criminal cases, it is clear that it includes some opportunity to present mitigating evidence and, in some circumstances, a full judicial hearing. *Specht v. Patterson*, 386 U.S. 605 (1967). Lower courts have held that in criminal cases it is a denial of due process for a court to refuse a defendant's request to speak to the sentencing court, *Ashe v. State of North Carolina*, 586 F.2d 334 (4th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979); to deny a defendant the opportunity to rebut factual assumptions relied upon by the court in determining the sentence, *United States v. Gonzalez*, 661 F.2d 488 (5th Cir. 1981); or to rely on inaccurate information in determining a sentence, *United States v. Jones*, 640 F.2d 284 (10th Cir. 1981). Even in ordinary administrative adjudications, where liberty or due process property interests are at stake, courts have held that an accused must have an opportunity to present mitigation testimony at a hearing. *Christhilf v. Annapolis Emergency Hospital Ass'n, Inc.*, 496 F.2d 174 (4th Cir. 1974); *Preston v. Piggman*, 496 F.2d 270 (6th Cir. 1974).

This Court has yet to address the extent or nature of an accused's right to allocute as to sentencing or to

present mitigation evidence at a hearing with respect to quasi-criminal proceedings. This question is a frequently recurring one that should be addressed by this Court.

Refusal to give James a hearing at which he could present mitigation evidence was extremely prejudicial in this case. The Hearing Committee based its recommended sanction in large part on James' demeanor and conduct during the hearing. It interpreted James' attitude as "cavalier" and concluded that he was unaware of his responsibilities as a lawyer. (Hearing Committee Report, pages 24-25, Appendix C, page 60a.) However, the Hearing Committee's impressions had been formed at a hearing which James had been told would be limited solely to the issues of liability.

Had a second hearing been held, as James was led to believe would be done, he could have expressed his willingness to admit to whatever wrongdoing the Committee found, produced evidence in mitigation, and present evidence of his absence of evil or fraudulent intent. An opportunity to present written materials was no substitute for the opportunity to make a personal statement to the Hearing Committee and to present live witnesses. In short, in reliance on the Chair's *sua sponte* decision to bifurcate the hearing between liability and mitigation, James has been denied his opportunity and his right to be heard in mitigation, and his proposed punishment has been based on his assertion of his innocence without providing an opportunity to allocute as to sentencing.

III.

WHERE THE BAR RULES PROVIDE THAT THE ACCUSED IS ENTITLED TO A HEARING ON THE ISSUE OF MITIGATION, THE DENIAL OF THE HEARING IS A VIOLATION OF DUE PROCESS AND IS IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT

Whatever may be the precise procedural safeguards to which an accused in a quasi-criminal proceeding is constitutionally entitled, the procedure here varied with the procedural rights established by the Bar rules and, for that reason, constituted a denial of due process. An essential aspect of due process is the right to be tried by a tribunal "governed by rules of law previously established." *Kilbourn v. Thompson*, 103 U.S. 168 (1881). With regard to ordinary administrative proceedings this Court has affirmed the basic principle that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).[1]

An attorney disciplinary proceeding is more than an ordinary administrative adjudication. As this Court recognized, a disciplinary proceeding is "quasi-criminal" in nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968). James has been denied his right to allocation[2] which

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[1] *See also Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Lower courts have consistently considered these cases to be based on the Due Process Clause. *See United States v. Caceres*, 440 U.S. 741, 758 n.1 (1979) (Dissenting Opinion).

[2] This Court recognized the importance of this right in *United States v. Behrens*, 375 U.S. 162 (1963).

right is guaranteed to respondents in the District of Columbia disciplinary proceedings by Rule XI, § 7(2) (Appendix D, page 69a). The Board of Professional Responsibility cannot, any more than any other administrative agency, arbitrarily deprive James of a procedural safeguard provided by its rules by first informing him that the question of mitigation would be deferred until after the hearing on liability (Appendix F, page 82a) and then suddenly demanding at the hearing that he present evidence immediately or forego his right to a hearing on mitigation.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari to the District of Columbia Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. M-93-81

IN THE MATTER OF RICHARD ALLEN JAMES, RESPONDENT, A MEMBER OF THE BAR OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

Argued May 26, 1982
Decided Oct. 21, 1982

Martha J. Tomich, Assistant Bar Counsel, with whom Edwin Yourmans, Deputy Bar Counsel, Washington, D.C., was on the brief, for the Bd. on Professional Responsibility.

William F. Krebs, with whom Goeffrey P. Gitner, Washington, D.C., was on the brief, for respondent.

Before NEWMAN, Chief Judge, and MACK and PRYOR, Associate Judges.

NEWMAN, Chief Judge:

The Board on Professional Responsibility found that respondent had violated several disciplinary rules in connection with two matters involving different clients. With regard to one case, the Board found that respondent had improperly converted to his own use funds intended by the client to be paid to a third party in settlement

of a legal dispute, and that this constituted, *inter alia*, "conduct involving dishonesty, fraud, deceit, or misrepresentation" in violation of DR [Disciplinary Rule] 1-102(A)(4). In the other case, the Board concluded that respondent violated DR 5-104(A) by failing to take appropriate steps to protect his clients from a potential conflict of interest that arose when he both drafted and entered into a real estate transaction with them, notwithstanding respondent's lack of fraudulent intent. Respondent challenges these findings and conclusions of law. He also asks us to reject the finding of one violation on the ground that he was not given adequate notice of the charge. A remand for reconsideration of the sanction is sought because respondent's opportunity to present mitigating evidence was allegedly inadequate. Finally, he contends that the Board's recommended sanction is unwarranted. We reject these challenges and adopt the recommended sanction of a two year suspension from the practice of law.

I. FACTS

A. The *Coverdale* Case (No. 319-79)

In September 1978 responent was retained by Louvenia Coverdale to represent her as a defendant in a personal injury action. In October 1979, Mrs. Coverdale agreed to pay the plaintiff $1,250 in settlement of the dispute, and the suit was dismissed. Respondent billed her $1,500 for his services. She proposed to satisfy her obligations in monthly installments of $400, with half of each payment going to the plaintiff to satisfy the settlement, and half to respondent in payment of his fee. After the plaintiff rejected this arrangement, Mrs. Coverdale proposed to respondent that the full amount of each installment be paid to the plaintiff until the

settlement was satisfied, and that subsequent payments be applied to the fee. According to Mrs. Coverdale's testimony, which was accepted by the Hearing Committee and the Board, respondent accepted this arrangement and promised to implement it on her behalf.[1] Thereafter, Mrs. Coverdale gave respondent $350 in November 1979, and payments of $400 each in the succeeding three months. However, respondent made no effort to transfer funds to the plaintiff, and, without informing the client, deposited the payments in his personal professional account.[2]

In December 1979 or January 1980, the plaintiff's counsel informed respondent that he would seek judicial relief from the order of dismissal. Respondent then advised Mrs. Coverdale to suspend her payments until the court acted on the plaintiff's motion. On April 30, a hearing on the motion was held. Respondent told the court that his client had paid only $350 toward the settlement, and had not sent him any funds for three months. He failed to inform the court that payments were suspended on his own advice, and stated instead that his client was unable to pay any faster. He concurred in plaintiff's contention that Mrs. Coverdale had breached her agreement, and suggested that the plaintiff could attach her property to enforce it. The court stated that the motion would be denied if the full $1,250 was

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[1] As explained in Part II, the fact that respondent contradicted his client's testimony in some respects does not vitiate the fact that substantial evidence supporting the Board's finding exists. Accordingly, we evaluate the evidence in a light favorable to petitioner.

[2] Following an inquiry by Bar Counsel, the amount of the February payment was deposited in respondent's client escrow account.

paid immediately. Respondent neither informed the court that his client had already paid him an amount sufficient to cover the settlement, nor offered to pay it forthwith. Instead, he requested fifteen days to *attempt* to raise the money. The court then granted the motion setting aside the settlement.

Respondent told Mrs. Coverdale that the reason the settlement was set aside was that the entire amount had not been paid within fifteen days of the settlement. He failed to inform her that the motion would have been denied if the full amount had been paid as of the hearing date.

The Hearing Committee found that respondent had violated several disciplinary rules in connection with the Coverdale matter: DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-102(A)(5) (conduct prejudicial to the administration of justice); DR 6-101(A)(1)-(3) (neglect of a legal matter); DR 7-101(A)(1)-(3) (intentionally failing to seek the lawful objectives of the client, failing to carry out a contract for legal services, and prejudicing the client during the course of the professional relationship); and DR 9-102(A) (failing to maintain client funds in an account separate from his own professional account). Only the finding of dishonesty and misrepresentation pursuant to DR 1-102(A)(4) was challenged before the Board. The Board accepted the Hearing Committee's findings.

B. The *Scott* Case (No. 312-79)

In November 1979, Walter and Saundra Scott retained respondent to aid them in renegotiating a lease on a building they owned, and in selling the property. Due to substantial losses incurred on the building, the Scotts

were eager to dispose of it. After efforts to sell to third parties had failed, Mr. Scott suggested that respondent buy the property. Respondent then drafted two documents. The first was a contract to sell the building to respondent for $40,000. The second suggested that the Scotts would retain an equitable interest and that the sale proceeds would be applied to the maintenance of the property, after satisfaction of existing liens. Upon subsequent resale, the net proceeds would be divided equally between respondent and the Scotts. However, the contract did not expressly require respondent to sell the building, and did not establish time limits for its rehabilitation or sale. Neither did it establish whether the Scotts would be entitled to any part of future rents collected, or provide for contingencies that might interfere with the performance of the arrangement, such as respondent's death.

Respondent reviewed the documents with the Scotts for about an hour, after which the contracts were executed. It was agreed that the second agreement would not be disclosed to third parties, so that the tenant would not learn of the true nature of the sale. Respondent's share of the net proceeds would be in lieu of a prior hourly fee arrangement. Respondent subsequently testified that he had suggested that the Scotts consult independent counsel, but they could not recall such a suggestion. Due to difficulties in obtaining necessary approvals from the District of Columbia Rental Accommodations Office, the contracts were never carried out.

The Hearing Committee concluded that respondent violated DR 5-104(A) by failing to make the "full disclosure" necessary to protect his clients from the conflict of interest inherent in a contract in which he had a personal interest differing from that of the clients.

The Board later concurred in that conclusion, finding that respondent neither "review[ed] with his clients in considerable detail the nature of the proposed agreement" nor "discussed in any detail . . . the nature of the potential conflict of interest." Board Report and Recommendation at 12.

II. FINDINGS OF DISHONESTY, FRAUD, DECEIT, AND MISREPRESENTATION

The sole substantive issue before us regarding the Coverdale case concerns the Board's finding of conduct involving dishonesty, fraud, deceit, and misrepresentation, which the Board found established a violation of DR 1-102(A)(4). We are required to accept that finding unless it is unsupported by substantial record evidence. D.C. App. R. XI § 7(3).

Testimony supporting a finding of dishonesty, etc., is more than ample. The client testified that respondent had agreed to forward her monthly payments to a third party in order to satisfy a settlement agreement. Respondent admittedly failed to do so. Instead, he applied the payments to his own account, without so informing the client. He later misled a court about the payments his client had made for purposes of satisfying the settlement agreement. He subsequently misinformed the client as to the reasons for the court's setting aside of the settlement agreement. The scienter requisite to a disciplinary code violation can be inferred from respondent's conduct. *See Geffen v. State Bar of California*, 14 Cal. 3d 843, 122 Cal. Rptr. 865, 537 P.2d 1225 (1975) (knowledge of employee's improper solicitations); *In re Vincent*, 347 N.E.2d 40 (Ind. 1978) (intent to prejudice or damage client). Thus there is substantial evidence of dishonest behavior in violation of professional standards.

Respondent disputed much of this testimony, particularly as regards the nature of the agreement concerning the use of the client's monthly payments, but the Board is not required to accept his version of the events. The Hearing Committee found the client's testimony to be credible, while that of respondent contained inconsistencies and was sometimes evasive. The Board acted well within the bounds of its authority in accepting this assessment. Accordingly, we conclude that the Board's finding of dishonest conduct, in contravention of DR 1-102(A)(4), was supported by substantial evidence.

III. STATE OF MIND REQUISITE TO A VIOLATION OF DR 5-104(A)

Respondent's only challenge relating to the Scott case involves the finding that he violated DR 5-104(A), which provides:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of his client, unless the client has consented after full disclosure.

The principal issue is a question of law: whether an improper intent is an element of a violation of this rule. It is not disputed that respondent entered into the land transaction in good faith, without intending to defraud or overreach his clients, and that the transaction may have been in the client's best interest. Respondent argues that his misdeeds, if any, were unwitting and at most negligent. He argues that the rule must be applied on the basis of his "subjective understanding" and that, accordingly, his good faith is a defense.

We reject that contention. The Rule creates an unqualified obligation to provide "full disclosure" before entering a business transaction like that involved in the Scott case. The rule contains no words indicating that discipline may not be imposed except when scienter is shown. This contrasts with other Disciplinary Rules, which contain explicit scienter standards. *See, e.g.,* DR 4-101(B) ("[A] lawyer shall not *knowingly* . . . ."). The evident intent of DR 5-104(A) is not merely to deter and punish actual fraud against clients. That is already proscribed by other rules. Rather it is to ensure that clients get full disclosure on which to base their decisions in *every* case involving differing interests, including those in which the attorney is acting in good faith. Accordingly, we hold that failure to provide the full disclosure required by DR 4-101(B) constitutes a violation of that rule regardless of whether the attorney intended to defraud the client or acted with other improper motives. This conclusion is in accord with those reached in numerous other jurisdictions. *In re Weiner,* 120 Ariz. 349, 586 P.2d 194, 197 (1978); *People v. Denious,* 118 Colo. 342, 196 P.2d 257, 263, 266-67 (1948); *Committee on Professional Ethics v. Baker,* 269 N.W.2d 463, 466 (Iowa 1978); *In re Brown,* 277 Or. 121, 559 P.2d 884, 887-91 (1977); *In re Boivin,* 271 Or. 419, 533 P.2d 171, 175-76 (1975).

"Full disclosure" includes a clear explanation of the differing interests involved in the transaction and the advantages of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client entailed in the agreement, including any liabilities that will or may foreseeably accrue to him. However, in this case, the Board found that respondent failed to review in adequate detail both "the nature

of the proposed agreement" and "the nature of the potential conflict of interest." The record is adequate to support the conclusion that the disclosure provided by respondent, including both the documents and the discussion of them, was inadequate to permit the clients to make a fully informed decision.

IV. PROCEDURAL ISSUES

Respondent contends that his right to due process was violated by a failure to give him adequate notice of charges that ultimately formed the basis for the finding that he had engaged in conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(5). He also alleges that the lack of notice contravened D.C. App. R. XI, § 7(2), which specifies that the charging petition "shall be sufficiently clear and specific to inform the respondent of the alleged misconduct."

Paragraph 10(b) of the Specification of Charges clearly put respondent on notice of the Disciplinary Rule with whose violation he was charged:

> Respondent violated the following provisions of the District of Columbia Code of Professional Responsibility:
>
> (b) Disciplinary Rule 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice as alleged in paragraph 7; . . . . [Specification of Charges, ¶ 10]

Paragraph 7 clearly identifies respondent's behavior at the hearing on the motion to set aside the settlement in the Coverdale case as the basis for the alleged violation. However, that paragraph does not mention false or misleading statements or omissions with regard to the payments made by his client.

> On February 29, 1980, plaintiff filed a Motion for Relief From Order requesting the Court to set aside the settlement entered on October 15, 1979 and permit the plaintiff to proceed to trial. In opposing this motion on behalf of Ms. Coverdale, respondent represented to the Court that he had been unaware of the plaintiff's whereabouts. That statement was false and respondent knew or should have known that it was false. [Specification of Charges, ¶ 7.]

When respondent appeared before the Hearing Committee, he was informed of the Committee's concern about his statement and omission regarding Mrs. Coverdale's payments, and asked to respond to those concerns in a written memorandum after the oral hearing. Therefore, in order to prevail, respondent would have to establish both that he was not on adequate notice of the charges before the oral hearing, and that the opportunity to respond in written form was inadequate to satisfy due process.

We need not decide the merits of this issue.[3] however, because respondent has not preserved his right to raise it

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[3] We note, however, that the two cases principally relied on by respondent would not be dispositive of his claim. In *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1225, 20 L. Ed. 2d 117 (1968), the charges against the attorney were amended to add a count based on a defense that the attorney had presented during his testimony. The Supreme Court held that "the absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." *Id.* at 552, 88 S. Ct. at 1226. However, as we explained in *In re Smith*, D.C. App., 403 A.2d 296 (1979), *Ruffalo* rests on the premise that the amendment of charges created an impermissible trap since, at the time of the proceedings, the attorney could not have known that the defense he asserted would subject him to disbarment. Such a situation is not present in the case at

[footnote continued]

in this court. Respondent could have objected to the lack of notice during the proceedings before the Hearing Committee, or at any time thereafter. He had several opportunities to do so, none of which he accepted. No objection or request for an additional oral hearing was made during the evidentiary hearing. Neither was the issue raised in the respondent's post-hearing brief, which addressed the merits of the Committee's charge. Nor did he raise the issue before the Board. Finally, there was no mention of the lack of notice as to the charged violation in respondent's exceptions to the Board Report and Recommendation as filed in this court. Under similar circumstances, courts have held the respondent to have waived the right to raise his objection on appeal. *Athearn v. State Bar of California*, 20 Cal. 3d 232, 142 Cal. Rptr. 171, 172-73, 571 P.2d 628, 629-30 (1978) (Respondent waived right to review of commission's right to subpoena his bank records); *State Bar of Georgia v. Ellis*, 116 Ga. App. 721, 728, 158 S.E.2d 280, 285 (1968) (Respondent lost right of review when he attempted to correct alleged deficiencies for the first time at the appellate stage); *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Roberts*, 246 N.W.2d 259, 260 (Iowa 1976) (Court rejects Respondent's contention that he was not provided timely notice of hearing because it was not urged before the commission); *In re Crane*, 400 Mich. 484, 494, 255 N.W.2d 624, 626 (1977) (Respondent waived his demand for documents, witnesses, and bill of particulars because he did not bring it to the attention of the hearing panel or Grievance Board).

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bar. The instant case involves no amendment of charges. The issues involve the scope of the *original* charges and whether the Hearing Committee's statements to respondent regarding the matters of concern to them would suffice to vitiate any shortcomings in the charging document.

Our consideration of Board findings and recommendations is similar to our review of administrative agency decisions. *In re Dwyer,* D.C. App., 399 A.2d 1, 11 (1979). In the context of administrative appeals, we do not address objections that could have been, but were not raised prior to judicial review. *DeLevay v. District of Columbia Rental Accommodations Commission,* D.C. App., 411 A.2d 354, 358 (1980); *Dietrich v. District of Columbia Board of Zoning Adjustment,* D.C. App., 320 A.2d 282, 287 (1974); *John D. Neumann Properties, Inc. v. District of Columbia Board of Appeals and Review,* D.C. App., 268 A.2d 605, 606 (1970). The purposes of this policy are well known. First, when an issue is timely raised before the administrative tribunal, the problem may be corrected without the involvement of the appellate court, thereby avoiding a possible remand and subsequent appeal. Secondly, even when the complaining party does not get satisfaction from the administrative body, the appellate court's task is facilitated by the record of the agency's attention to the issue. Both of these considerations apply with comparable force in the context of disciplinary proceedings.[4]

We conclude that where respondent had a fair opportunity to raise the inadequacy of notice before the Hearing Committee and the Board, and failed to take advantage of it, he has waived his right to have that issue resolved in this court.

Respondent's other procedural objection is that he was denied an adequate opportunity to offer evidence

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[4] The fact that disciplinary actions are punitive does not alter the result. Even criminal defendants facing severe penalties may waive rights or objections by failing to assert them in a timely manner. *See, e.g.,* Super. Ct. Cr. R. 12(d) (failure to move for the suppresion of evidence before trial constitutes a waiver).

in mitigation of his offense, testimony that might have resulted in the recommendation of a lesser sanction. The right to present such evidence is provided in D.C. App. R. XI § 7.

At the hearing, the Chairman inquired about possible mitigation evidence:[5]

> I guess what I thought was we would defer any hearing on the issue of sanctions. At this time, do you know whether you would propose presenting any further witnesses on the subject of sanctions? [Tr. 200-01].

James responded as follows:

> . . . I don't know, can I bring in 25 or 30 people who think I'm a good guy? You know, there are lots of them that think I am and lots of them that think I'm not. And as for my professional responsibility, I think it's aboveboard. [Tr. 201].

The Committee then asked Bar Counsel and respondent to address the issue of sanctions in their post-hearing memoranda, and specifically asked respondent to include any additional mitigating evidence therein. Respondent did not object to this procedure in any way or ask that he be allowed to present his mitigation evidence by means of oral testimony rather than written statements. Instead, he followed the procedure outlined and submitted testimonials to his integrity from six people. However, in his post-hearing memorandum, respondent included a request for an additional hearing on the following matters:

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[5] Respondent also seeks to rely on a letter to him from the Chairman dated December 9, 1980, which is attached to respondent's brief. However, that document is not in the record. In any event, its substance regarding the deferral of mitigation evidence is reflected in the Chairman's inquiry at the hearing.

> (a) mitigating circumstances; (b) respondent's prior good record and lack of disciplinary complaints; (c) respondent's previous good reputation as an attorney; (d) the absence of evil or fraudulent intent related to any disciplinary infraction; and (e) respondent's willingness to admit any negligence or wrongdoing if such are found by this Committee. [Respondent's Post-Hearing Memorandum at 24].

The request was denied by letter of the Committee Chairman.

Respondent failed to raise the lack of a second oral hearing as an issue before the Board. Accordingly, the Board had no opportunity to order another hearing, and did not address the issue in its report to this court. Thus, for the reasons just discussed in connection with the due process claim, respondent has waived his right to have this contention reviewed by this court. *See Athearn v. State Bar of California, supra*; *State Bar of Georgia v. Ellis, supra*; *Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Roberts, supra*; *In re Crane, supra.*

V. SANCTION

D.C. App. R. XI § 7 provides that "the Court . . . shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted." The Board recommendation clearly indicated that while respondent's conduct in the Scott case might call for some sanction *short* of suspension, the decision to recommend a two year suspension was largely based upon the Coverdale matter. The Board's findings with respect to the latter case reflect serious misdeeds which were unbecoming to the profession and prejudicial

both to the client's interest and the administration of justice. Misuse of client funds, dishonesty to the client, and misleading a court were involved. These actions occurred because respondent accorded a higher priority to the collection of his fee than to serving his client or complying with professional standards. Under these circumstances, we cannot say that a two year suspension is unwarranted. Nor has any inconsistent disposition in a comparable case been brought to our attention. Accordingly, the recommended sanction of a two year suspension from practice is adopted.

So ordered.

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket Nos.
312-79, 319-79

IN THE MATTER OF:
RICHARD ALLEN JAMES

REPORT AND RECOMMENDATION

These two conslidated cases are here upon the Report of Hearing Committee Number Nine, which concluded that Respondent violated numerous disciplinary rules in his representation of his clients in two separate and unrelated matters. The Hearing Committee recommended that Respondent should be suspended from the practice of law for one year and one day, thus requiring Respondent to bear the burden of proving rehabilitation before he can be permitted to resume the practice of law in this jurisdiction.

Respondent challenges the findings of fact of the Hearing Committee as unsupported by clear and convincing evidence, urges that the Committee erred in certain of its conclusions of law, and argues that, in any event, the recommended sanction is too harsh under the circumstances here. Bar Counsel urges affirmance of the Hearing Committee's findings of fact and conclusions of law, but argues that the appropriate sanction for the violations found in these cases is disbarment.

For the reasons that follow, we agree with the Hearing Committee that Respondent committed numerous, very serious violations of the disciplinary rules, and we recommend he be suspended from the practice of law for two years.

FACTS

1. The *Scott* Case, No. 312-79

In November 1979 Walter and Sandra Scott retained Respondent to assist them in renegotiating the terms of a lease on a residential dwelling the Scotts owned in Washington, D.C. The Scotts were experiencing substantial losses on this rental property and also sought Respondent's assistance regarding a possible sale of the property. The Scotts' tenant, however, had retained an attorney who was imposing significant legal roadblocks in opposition to the Scotts' efforts either to increase the rent or to sell their property.

In December 1979, after several other approaches to resolving these problems had been unsuccessful, and the Scotts' losses had reached an unacceptable level, Mr. Scott suggested that Respondent himself purchase the property. Respondent initially indicated that he did not wish to do so, but in January 1980 Respondent presented to the Scotts two proposed contracts which Respondent had drafted. The first contract provided that Respondent would pay $40,000, the approximate appraised value of the property, and the Scotts would convey the property to him. The second document,

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[1] The facts in these two cases are set out in fuller detail in the excellent and comprehensive report of Hearing Committee Number Nine, which report contains citations to the record for all the facts set forth herein.

however, suggested that while Respondent would obtain legal title, the Scotts would retain an equitable interest in the property. That document specified that the sale proceeds remaining after satisfaction of existing liens would be placed in a special account for use by Respondent to maintain and improve the property. The agreement further provided that "upon later disposition and sale of the property," the net proceeds would be divided equally between the Scotts and Respondent.

The Scotts met with Respondent on January 2, 1980, for approximately one hour, reviewing these documents and ultimately executing them. The Scotts and Respondent agreed that they would not disclose to third parties the existence of the second contract, so as to avoid informing the Scotts' tenant of the true nature of the sale. The Scotts also agreed with Respondent that his 50% share of the profits on the sale of the property would be in lieu of the prior agreement under which the Scotts were to pay Respondent $75 per hour for his time spent on this matter.

The parties have different recollections as to whether Respondent ever suggested that the Scotts should consult independent counsel concerning this proposed agreement.[2] In any event, the Scotts believed at the time, and apparently continue to believe, that Respondent's proposal was fair and constituted a "viable program" to help them out of a difficult problem.

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[2] Respondent and his associate testified at the hearing that Respondent did make such a suggestion, Tr. 67, 102, although Respondent's Answer to the Petition in this case had admitted that no such suggestion was made. *See* Specification of Charges, filed October 20, 1980, at ¶ 5; Answer to specification of Charges, filed October 31, 1980, at ¶ 5. The Scotts both testified that they recalled no such suggestion, although they could not categorically rule out the possibility it might have occurred. *See* Tr. 50, 89.

The contract drafted by Respondent did not establish any time frame for rehabilitating or reselling the property and did not expressly require that Respondent ever sell the property. It was silent regarding whether the Scotts would be entitled to any portion of any future rent that might be collected. In addition, it made no provision for unanticipated contingencies, such as the death of Respondent prior to sale of the property.

Because of continuing problems in obtaining necessary approvals from the D.C. Rental Accommodations Office, the contracts between the Scotts and the Respondent never were carried out. Ultimately, for reasons unrelated to the contracts between them, the Scotts discharged Respondent, and they requested an itemization of his fees. Respondent informed the Scotts that the fee for his services and those of his staff would be $5,000, although he stated that in view of the Scotts' financial problems he would not expect his fee to be paid until the property had been sold.[3] To date Respondent has

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[3] However, after institution of the instant proceedings, Respondent filed suit against the Scotts for recovery of attorney's fees, despite the fact that the property still had not been sold. That suit ultimately was settled by the Scotts' payment of $3,500 to Respondent.

Respondent implied in his testimony before the Hearing Committee that the reason he decided to sue the Scotts may well have been related to the pending disciplinary proceedings. *See* Tr. 103-04 (emphasis added):

> If I would push that thing through, they'd owe me $20,000. I don't want their money. I want paid [sic] a reasonable amount for the hours that I put in on this case, and I'm not even getting that. If I charged them $75 an hour for 150 hours, I'd be asking $10,000 for them. I don't want their $10,000. All I want is a little bit of payment for what I did. *I probably would have never done that, if you want to know the truth, if all this hadn't come up, but I'm entitled to it.* At a minimum, I'm entitled to it.

failed to provide any itemization of his fee to the Scotts or to the office of Bar Counsel. Respondent testified at the hearing in this matter that he and his staff spent approximately 150 hours working on the Scotts' case over a period of two-three months. Respondent stated that in view of his $75 per hour charge for all work done by his office, he could have charged substantially more than $5,000. Respondent testified that he and his staff did not keep any time records of the services provided to the Scotts, and that he could only estimate how much of the alleged 150 hours was performed by himself and how much by his law clerk or others. Respondent stated at the hearing that if the Scotts continued to insist on an itemization of his bill, he would feel it appropriate to raise his fee from $5,000 to $10,000.[4]

The Hearing Committee concluded that Respondent violated Disciplinary Rule ("DR") 5-104(A)[5] in that he failed to take appropriate steps to protect the Scotts from the potential conflict of interest inherent in the

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[4] *See* Tr. 117:

If they insist on me itemizing this and charging them a full fee, I would say that my bill will be in excess of $10,000. I choose not to do this. If you want to talk them into doing that, you're going to cost them $5,000, simple as that, because if I itemize this, I'm going to charge for the full amount. Sure, I can go back through my calendars; it would take me about a half a day, but it would be well worth it if I want the extra $5,000, but no, my position right now is not to charge them a full fee.

[5] Disciplinary Rule 5-104(A) reads as follows:

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

contracts Respondent drafted between himself and his clients. The Hearing Committee concluded with regard to Respondent's fee that under all the circumstances, including Respondent's failure to have appropriate office procedures by which to measure his hours, his fee was inappropriate and might be deemed to be "clearly excessive" within the meaning of DR 2-106(A). Nevertheless, the Committee apparently concluded that no disciplinary violation was clearly proven with regard to Respondent's fee. *See* Hearing Committee Report at 24.

2. The *Coverdale* Case, No. 319-70

In September 1978 Respondent was retained by Mrs. Louvenia Coverdale to represent her in a personal injury action filed against her by a Mr. John Stevenson. In October 1979 Respondent and counsel for Mr. Stevenson jointly filed a praecipe dismissing Mr. Stevenson's case in consideration for Mrs. Coverdale's agreement to pay Mr. Stevenson $1,250. At the time the praecipe was filed, Respondent advised Mrs. Coverdale that she would be required to pay the $1,250 within fifteen days. At about the same time, Respondent submitted to Mrs. Coverdale a bill for his legal services, showing an amount due (above the original $500 retainer paid to Respondent) of $1,500.

Mrs. Coverdale promptly informed Respondent that she was unable to satisfy this entire debt immediately, but that she could pay installments of $400 per month, of which half would be paid toward her settlement obligation and half toward the attorney's fee bill. When Respondent later informed Mrs. Coverdale that Mr. Stevenson was unwilling to accept payment in installments, Mrs. Coverdale suggested that the full amount of her initial installment payments be applied to the amount

owed to Mr. Stevenson, with Respondent obtaining his attorney's fee from the subsequent installments paid after satisfaction of the settlement obligation to the plaintiff. Mrs. Coverdale testified that Respondent indicated he agreed to this arrangement and was planning to implement it with Mr. Stevenson's counsel.[6] Mrs. Coverdale sent Respondent a check for $350 in November 1979 and made payments to Respondent of $400 in December, January and February.

In the meantime, Respondent took no further action to attempt to work out any instalment payment arrangement with Mr. Stevenson or his counsel. On November 19, 1979, Mr. Stevenson's original counsel withdrew from the representation and Respondent testified that he did not know how to contact Mr. Stevenson. Respondent proceeded to deposit Mrs. Coverdale's November, December and January checks in his professional account, and not his client escrow account.[7] Respondent did not inform Mrs. Coverdale that he was applying these payments toward his bill for attorney's fees, rather than applying them toward the settlement obligation, as Mrs. Coverdale had understood.

In December 1979 or January 1980 a new attorney was retained by Mr. Stevenson. That attorney contacted

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[6] As will be discussed in detail below, Respondent's explanation of the understanding between himself and Mrs. Coverdale regarding these installment payments differs substantially from Mrs. Coverdale's testimony.

[7] Although Mrs. Coverdale's November 3, 1979, check contained a notation that $50 of that check was to be paid to the plaintiff, *see* Bar Ex. 38(b), Respondent deposited the full amount of that check in his professional account. However, following Bar Counsel's inquiry concerning this matter, Respondent deposited the full amount of Mrs. Coverdale's February 1980 check into his escrow account. *See* Bar Ex. 38(b); Tr. 133-36; Resp. Ex. 3.

Respondent and indicated that Mr. Stevenson intended to file a motion with the court seeking relief from the order of dismissal. Respondent subsequently advised Mrs. Coverdale that, in view of Mr. Stevenson's position, she should suspend her monthly installments after February until the court resolved the matter.

A hearing was held before Judge Fauntleroy in D.C. Superior Court on April 30, 1980, concerning plaintiff Stevenson's motion for relief from the order. At that hearing, Respondent represented to the court that Mrs. Coverdale had paid only $350 toward the settlement obligation, that he had not received a payment from her in three months, that she was unable to pay any faster, and that Mr. Stevenson was free to attach her property to enforce the judgment. Respondent agreed with the plaintiff's argument that Mrs. Coverdale had breached her agreement to pay, although Respondent argued that the court should deny the requested relief. The judge twice stated that he would deny the motion if Mrs. Coverdale would immediately pay the $1,250 amount. Respondent asked for 15 days to attempt to raise the money, suggesting that he might be willing to pay it from his fee. At no time, however, did Respondent offer to pay the settlement amount immediately, nor did he inform the court that Mrs. Coverdale's prior payments to him were sufficient to cover the entire settlement. Respondent also failed to inform the court that Mrs. Coverdale had ceased making monthly payments on Respondent's advice. The judge then granted plaintiff's motion to set aside the settlement.

In informing Mrs. Coverdale of the court's ruling, Respondent indicated that the basis for the judge's decision was Mrs. Coverdale's failure to pay the full obligation within fifteen days of the October settlement.

Respondent never informed Mrs. Coverdale that the judge indicated he would deny the requested relief if arrangements could be made to pay promptly the full amount of the settlement.

The Hearing Committee concluded that in the *Coverdale* matter Respondent had violated DR 1-102(A)(4), by engaging in conduct involving dishonesty, fraud, deceit and misrepresentation. The Committee also found that Respondent violated DR 1-102(A)(5) (engaging in conduct prejudicial to the administration ofjustice), by making misleading statements to the judge at the hearing on plaintiff's motion for relief from the settlement. The Hearing Committee further found that Respondent's failure to apply Mrs. Coverdale's funds to the settlement violated DR 6-101(A)(3) (neglect of a legal matter entrusted to him) and DR 7-101(A)(1)-(3) (intentionally failing to seek the lawful objectives of his client, failing to carry out a contract of employment for legal services, and prejudicing or damaging his client during the course of a professional relationship). Finally, the Hearing Committee concluded that Respondent violated DR 9-102(A) by failing to maintain his client's funds in an identifiable account separate from his own professional account.

DISCUSSION

1. The *Scott* Case

The sole issue[8] raised by Respondent with regard to the *Scott* case is whether the Hearing Committee erred

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[8] Respondent also argues that the Hearing Committee's criticisms of Respondent's fee-setting practices were unfounded. Since we read the Hearing Committee as having concluded that Bar Counsel failed to establish by clear and convincing evidence a disciplinary

[footnote continued]

as a matter of law in concluding that Respondent violated DR 5-104(A), in view of the Hearing Committee's findings of fact that there was no fraudulent intent by Respondent, and that indeed the agreements he drafted may well have been generally in his clients' best interest. We reject Respondent's argument that a showing of fraud or overreaching is a necessary element for violation of DR 5-104(A).

Respondent in his brief cites numerous cases which he contends stand for the proposition that a showing of fraud or overreaching by the attorney is an essential element of a DR 5-104(A) violation. *See, e.g., Eschwig v. State Bar of California*, 1 Cal. 3d 8, 81 Cal. Rptr. 352, 459 P.2d 904 (1969); *Yale v. State Bar*, 16 Cal. 2d 175, 105 P.2d 112, 114 (1940); *Ex Parte McDonald*, 112 Mont. 129, 113 P.2d 790 (1941); *In re Egan*, 37 S.D. 159, 157 N.W. 310 (1916); *Gelders v. Haygood*, 182 F. 109 (C.C.S.D. Ga. 1910).[9] In our view, while fraud and overreaching obviously are important in determining the appropriate sanction for a DR 5-104(A) violation, they are not essential elements in the demonstration of an improper conflict of interest under that rule.

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violation with regard to Respondent's fee practices, *see* Hearing Committee Report, at 24, and since we share that view, we find it unnecessary to reach Respondent's argument that his fee in fact was "appropriate" under the circumstances here.

[9] With one possible exception, all the cases cited by Respondent appear to have involved fraud or dishonesty, but cannot fairly be read to *require* such a showing for a DR 5-104(A) violation. However, *Gelders v. Haygood*, 182 F. 109 (C.C.S.D. Ga. 1910), might be read to suggest such a proposition, at least by implication. The *Gelders* decision, a 70-year old case, arose under a different disciplinary code than that in effect today. In any event, to the extent *Gelders* stands for a different rule than announced in text, we decline to follow that decision from a different jurisdiction.

Respondent's suggestion that fraud or overreaching is an essential element of DR 5-104(A) finds no support whatever from the language of the rule, which absolutely prohibits a lawyer from entering into a business transaction with his or her client if they have differing interests, "unless the client has consented after full disclosure":

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

Moreover, numerous courts in other jurisdictions have made clear that an attorney need not intend to defraud anyone, to gain an unfair advantage, or to damage his or her client (or anyone else) in order to violate this rule. *See In re Weiner*, 120 Ariz. 349, 586 P.2d 194, 197 (1978):

> [1] When an attorney enters into a business transaction with his client, he must not only insure that the transaction is fair, but he must also fully disclose all conflicts inherent in such dealings and all pertinent facts. . . . The duty to disclose is not obviated by a showing that the outcome of a transaction was fair to the client. Full disclosure of all pertinent information, including the presence of any conflicts of interest, is independently required.

Accord, e.g., In re Brown, 277 Ore. 121, 559 P.2d 884, 887-91 (1977); *In re Boivin*, 533 P.2d 171, 175-76 (Ore. 1975); *People ex rel. Kent v. Denious*, 118 Colo. 342, 196 P.2d 257, 263, 266-67 (1948). Thus, even if the business transaction between attorney and client arguably is in the client's best interest, the attorney nevertheless must fully describe to the client the nature of the transaction, explain all foreseeable or potential conflicts, and

obtain the client's informed consent. *See In re Wolk*, 82 N.J. 326, 413 A.2d 317, 320-21 (1980); *In re Weiner, supra*, 586 P.2d at 197; *In re Brown, supra*, 559 P.2d at 888-91; *In re Boivin, supra*, 533 P.2d at 175-76; *In re Staples*, 486 P.2d 1281, 1283 (Ore. 1971); *People ex rel. Kent v. Denious, supra*, 196 P.2d at 266-67.

In the instant case, the evidence is in conflict concerning whether Respondent advised his clients that they should consult independent counsel regarding this contract.[10] Even assuming he did so, however, Respondent knew or should have known that his clients were in difficult financial and emotional straits at the time, *see, e.g.*, Tr. 31-32, 55, and thus would be quite likely to follow Respondent's advice concerning the transaction. Under these circumstances, we hold that Respondent had a duty to use special care in drafting this agreement between himself and his clients, so as not to unfairly prejudice their interests. Moreover, we hold that in such circumstances a lawyer has a duty to review with his clients in considerable detail the nature of the proposed agreement, so that their consent to the potential conflict is fully informed. The record in this case is clear that Respondent did not take these precautions. The agreement he drafted was exceedingly vague in several important respects, failing to provide any detail about such key questions as how the judgment should be made regarding when (or whether) to sell the property.[11]

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[10] *See* note 2, *supra*.

[11] Contrary to Respondent's suggestion, we are not finding him guilty of negligence or malpractice. Instead, we are holding that under the circumstances here a lawyer has a duty to use special care in drafting an agreement between himself and his clients; such a contract is not the usual arms-length transaction in which

[footnote continued]

Thus, while the Scotts apparently intended to convey to Respondent only "straw title," the agreements may well have gone far beyond that. In addition, there is no indication in the record that Respondent discussed in any detail with the Scotts the nature of the potential conflict of interest between them and himself. Thus, we conclude that the consent which the Scotts gave to Respondent to proceed in this action was not the type of "informed consent" required by DR 5-104(A).

2. The *Coverdale* Case

We turn next to the *Coverdale* case, in which the facts are very seriously in dispute, and which, we believe, presents far more serious charges against Respondent. Respondent attacks many aspects of the Hearing Committee's findings and conclusions concerning his conduct in the *Coverdale* matter. We begin our analysis by considering what we believe to be the fundamental question in this case: What was the initial understanding between Mrs. Coverdale and Respondent concerning the intended disposition by Respondent of Mrs. Coverdale's monthly installment payments?

Mrs. Coverdale testified that she and Respondent initially agreed that half of each of her monthly installment payments would be credited toward her bill for attorney's fees and half toward the settlement obligation.[12] Mrs. Coverdale further testified that after

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the contracting parties can be expected to look after their own interests—clients appropriately should expect their own lawyer to use special care in considering their interests as he proceeds with such an agreement between attorney and client.

[12] Mrs. Coverdale testified that the first check of $350 was intended to be paid $300 toward the $1,500 attorney's fee obli-

[footnote continued]

Respondent informed her that plaintiff was unwilling to accept installment payments, she and Respondent agreed that the full amount of her installment payments should be credited toward the settlement obligation in order to pay it more quickly, with the attorney's fees bill being paid from the later monthly payments. She further testified that she understood that Respondent had agreed to this arrangement and that it was being implemented.

Respondent disagrees with Mrs. Coverdale's recollection of their understanding and challenges the Hearing Committee's finding in that regard. Respondent apparently[13] takes the position that Mrs. Coverdale's first $350 check was to be credited toward the settlement obligation, while her next three $400 checks were intended to be credited solely toward her attorney's fees bill.

Faced with this clear conflict between witnesses' testimony, the Hearing Committee concluded that it "has no hesitancy in concluding that Mrs. Coverdale's testimony is to be credited and respondent's is not." Hearing Committee Report, at 19. We have held in the past that this Board normally should give great weight to a Hearing Committee's assessment of credibility, since the Committee observes the witnesses and is in a far better position to assess their demeanor and credibility than can this Board based upon a cold record. *See, e.g., In re Carter,* Nos. 70-77, 193-77, at 6 (Bd. Prof. Resp., Oct. 27, 1978) (Board gives "great deference to the findings of

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gation, and $50 toward the $1,250 settlement obligation, thus resulting in the equalization of the balance on the two obligations. Thereafter, half of each $400 check was to be credited to each of the two obligations.

[13] *See* pp. 15-16, *infra.*

fact of its Hearing Committee. . . . A Hearing Committee has the opportunity to observe the demeanor of the witnesses and to hear the tone and nuances of the testimony which can never be captured fully from a written record."). Moreover, in the instant case our independent review of the record convinces us that the Committee correctly rejected Respondent's version.

First, as the Committee noted, Mrs. Coverdale is a particularly credible witness. She is a former assistant principal in the District of Columbia school system. She did not initiate the instant complaint against Respondent[14] and, according to the Committee, she bore no apparent grudge against Respondent. Moreover, Mrs. Coverdale's testimony was corroborated by other evidence of record.

On the other hand, the Hearing Committee found that "respondent's testimony was highly evasive, inconsistent, and frequently non-responsive. His story was inherently unbelievable in many respects and he contradicted himself on numerous occasions." Hearing Committee Report, at 19. Indeed, Respondent's testimony on this, the most critical issue in the case, not only was inconsistent with documentary evidence in the record,[15] but also was self-contradictory.

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[14] The disciplinary complaint was filed by Mr. Stevenson, plaintiff in the civil action, who claimed that Respondent had diverted from Mrs. Coverdale funds that were intended for Mr. Stevenson. Mrs. Coverdale testified at the hearing only upon the request of Bar Counsel.

[15] Respondent's explanations on this issue conflict not only with the notation placed by Mrs. Coverdale on her November 1979 check deposited by Respondent, but also with the notation on Mrs. Coverdale's February 1980 check. *See* note 7, *supra*; page 16, *infra*.

In Respondent's first filing with Bar Counsel on this matter, he stated that following the settlement agreement he "received $350 from Mrs. Coverdale to be applied toward this judgment, with the understanding that the remainder of the amount would be paid at the rate of $100 per month." Bar Ex. 27. In a letter Respondent sent to his client on February 20, 1980, after Bar Counsel's inquiry, he implies that the first $350 paid was intended to be used for the settlement, while *none* of the subsequent monthly payments was so intended, making no mention of the $100 per month notion expressed to Bar Counsel. *See* Bar Ex. 33.[16] In Respondent's testimony before the Hearing Committee in this matter, he initially implied that he divided Mrs. Coverdale's payments in accordance with the notations that she entered on her checks, *see* Tr. 159; then he suggested that payment of the settlement obligation was not part of his duties, implying that the full amount of

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[16] Respondent argues that Mrs. Coverdale's failure to contradict or respond to his February 20 letter confirms the accuracy of his version. We reject this argument for three reasons. First, Respondent's letter is somewhat ambiguous, and Mrs. Coverdale may well not have understood it to suggest that the two $400 checks were being applied to attorney's fees only. Second, Mrs. Coverdale had written Respondent a letter on February 18 expressing her understanding of the use of her monthly installment checks, *see* Bar Ex. 29(a); since Respondent apparently had not received her letter when he wrote his February 20 letter—Respondent's February 20 letter makes no mention of Mrs. Coverdale's February 18 letter; indeed, Respondent in his letter lists the checks he has received to date from Mrs. Coverdale, and he does not mention the check which she had enclosed with her February 18 letter—Mrs. Coverdale may well have assumed no further response was needed. Finally, we decline to rely on a client's failure to respond to such a self-serving letter, especially when the documentary evidence (the written notations on Mrs. Coverdale's checks) clearly refutes it.

all Mrs. Coverdale's monthly installments was intended for his fees, *see* Tr. 160; but ultimately Respondent categorically stated that the monthly checks he continued to receive from Mrs. Coverdale (after plaintiff Stevenson indicated he would not accept installment payments) were intended to be used solely to pay Respondent's fee, *see* Tr. 169-72. Unfortunately, each one of Respondent's versions conflicts not only with Mrs. Coverdale's testimony, but also with the notations made by Mrs. Coverdale on checks which she sent to Respondent in regard to this matter. Bar Exhibit 38(b), Mrs. Coverdale's November 3, 1979, check to Respondent in the amount of $350, which Respondent endorsed and deposited in his professional account, expressly noted on the face of the check that $300 was to be paid toward the attorney's fees bill and $50 was to be paid toward the settlement obligation to the plaintiff. Respondent has never explained how his understanding of the division of Mrs. Coverdale's payments could be consistent with those notations. Moreover, on Mrs. Coverdale's February 18 check for $400, she included the following notation on the front of the check: "Re: Att Fee & Plaintiff Acceptance Fee Original cost for both $2,750^{00}, Bal for both $1,200^{00}." While Mrs. Coverdale's notation failed to specify the precise division of this check as between the two obligations, it is extremely difficult to square that notation with Respondent's contention that none of these $400 checks was intended to be used for payment of Mrs. Coverdale's settlement obligation to the plaintiff.

Finally, our review of Respondent's testimony as a whole confirms the Hearing Committee's conclusion that Respondent's account was evasive and lacking in credibility. *See generally* Tr. 155-95. Accordingly, we agree

with the Hearing Committee that the evidence is clear and convincing that, as Mrs. Coverdale testified, she and Respondent had agreed that her monthly payments would be devoted solely toward her settlement obligation to the plaintiff until that was satisfied, and only then would those payments be applied toward her outstanding bill for attorney's fees.

Having reached that conclusion, the nature and seriousness of Respondent's violations become clear, and we have little difficulty rejecting Respondent's other challenges to the Hearing Committee's conclusions. Indeed, it is simply impossible to justify or rationalize Respondent's conduct at the April 30, 1980, hearing on plaintiff's motion to set aside the settlement.

At that hearing, the judge made it clear that he would reject plaintiff's motion and would enforce the settlement if Mrs. Coverdale would promptly pay the full settlement obligation. Since we have concluded that Respondent was aware that Mrs. Coverdale intended her payments to be so applied, and since by the time of the April hearing she had paid plaintiff $1,550 in monthly payments—$300 more than the settlement obligation—Respondent's failure to so inform the court, or otherwise to agree on Mrs. Coverdale's behalf to pay the settlement obligation promptly, is totally unjustifiable. Respondent argues to this Board that his statements to the judge did suggest that Mrs. Coverdale had paid certain attorney's fees to Resondent, and Respondent also offered, if given fifteen days' time, to try to arrange for payment of the settlement amount, even if that required using some of his attorney's fees in order to do so. Our review of the transcript of that hearing, Bar Ex. 36, however, convinces us that Respondent's statements to the court were, if not direct falsehoods, so evasive and far from the truth

as to amount to misrepresentation. When asked by the court "How much have you accumulated now?" for payment to the plaintiff, Respondent stated "I think there is $350 at this time. . . . I haven't gotten a payment in three months from her." Bar Ex. 36 at 5. Respondent went on to recite Mrs. Coverdale's financial problems, saying "that's all I can get from her." *Id.* Knowing that Mrs. Coverdale expected her money to be paid to satisfy the settlement obligation, and knowing that the judge would enforce the settlement if the money were so used, Respondent clearly made a conscious choice not to inform the court that he had diverted for his own use the funds which his client thought were being paid to implement the settlement. Respondent also implied to the judge that Mrs. Coverdale had ceased making monthly payments due to her financial problems, apparently choosing not to advise the court that her action was based upon Respondent's advice. Respondent then compounded his misrepresentations by telling Mrs. Coverdale, following the hearing, that the judge had granted plaintiff's motion for relief from the settlement because she had failed to pay the settlement amount when it was due in October. Thus, Respondent concealed from his client the fact that the judge offered, but the Respondent failed to accept, the opportunity to pay the settlement amount promptly after the hearing in order to conclude the matter.

Respondent argues strenuously that no matter what the initial understanding with Mrs. Coverdale, Respondent should not be faulted for failing to pay to the plaintiff any of Mrs. Coverdale's monthly installments, since Respondent had been given reason to believe that plaintiff no longer wished to honor the settlement. An alternative version of the same argument put forward

by Respondent is that Mrs. Coverdale herself was responsible for breaching the original settlement by failing to pay the amount due in a lump sum, and in view of that breach Respondent should not be faulted for applying toward his attorney's fees bill the full amount of her subsequent monthly installments. The short answer to these contentions is that they suggest that Respondent still fails to understand the nature of his ethical duties. Whether or not Mrs. Coverdale had breached her obligation to the plaintiff, and whether or not the plaintiff would accept her monthly installment payments, there is simply no justification for Respondent's allowing Mrs. Coverdale to believe that he was applying these payments toward her obligation to the plaintiff, while in fact he was simply converting them to his own use. Even more importantly, once Mrs. Coverdale's payments had reached the total amount owed to the plaintiff, there were several courses of action obviously available to Respondent in order to attempt to finalize the settlement, which Respondent knew was Mrs. Coverdale's desire.

Despite the fact that plaintiff's counsel had indicated that he intended to file a motion for relief from judgment, it of course was open to Respondent to tender to the plaintiff the full sum of the settlement amount in satisfaction of Mrs. Coverdale's obligation. Such a tender might have been accepted by the plaintiff; in any event, the tender obviously would have been highly relevant and beneficial to Mrs. Coverdale at such time as the plaintiff did file a motion for relief from judgment. Finally, as indicated above, there simply can be no excuse for Respondent's failing affirmatively to state to the judge at the April 30 motions hearing that Respondent had received from Mrs. Coverdale sufficient funds by that time to pay the settlement obligation in full, and that she wished to do so.

Under these circumstances, it is clear that Respondent engaged in conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of DR 1-102(A)(4). Moreover, Respondent's evasiveness or deception before the motions judge constituted conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(5). It is also clear that Respondent violated DR 9-102(A) by failing to maintain Mrs. Coverdale's funds in an identifiable account separate from his own professional account.[17]

SANCTION

Were we faced with the *Scott* case alone, we doubtless would conclude that Respondent's violation of DR 5-104(A) requires some sanction, but that Resonent's good faith in this transaction, as found by the Hearing Committee, *see* page 9, *supra*, militates against any suspension from practice. Respondent's conduct in the *Coverdale* matter, however, reflects a total lack of the candor and care—indeed, the fundamental honesty—which the public should be able to expect from a member of the legal profession. We conclude that such serious violations of the disciplinary rules demand a very serious sanction.

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[17] We also affirm the Hearing Committee's conclusions that Respondent's conduct violated DR 7-101(A)(3), by intentionally failing to seek the lawful objectives of his client within reasonable available means, failing to carry out a contract of employment for legal services, and prejudicing his client during the course of his professional relationship. The Hearing Committee also concluded that Respondent's conduct, as described above, violated DR 6-101(A), in that he neglected a legal matter entrusted to him. We find it a close question as to whether the course of conduct described herein amounts to "neglect." In view of our conclusions on the other issues, we find it unnecessary to reach that issue.

We have previously held that while intentional misappropriation of a client's funds generally warrants disbarment, *see, e.g., In re Burka,* 423 A.2d 181 (D.C. App. 1980), commingling of funds based on a good faith misunderstanding may call for a much less severe sanction. *See In re Dwyer,* Nos. 356-78, 374-78 (Bd. Prof. Resp., Dec. 4, 1980) (three-month suspension); *In re O'Bryant,* No. 320-78 (Bd. Prof. Resp., June 13, 1980) (six-month suspension). We view Respondent's commingling here as far more serious than in *Dwyer* or *O'Bryant,* since we have concluded that Respondent knew of his client's intention that these funds be used first to pay her settlement obligation. On the other hand, the facts here do not rise to the level of a typical misappropriation case, such as *Burka,* since Respondent did not take any money to which he ultimately would not have been entitled; instead, his main misdeed came in unilaterally deciding to pay himself first, despite his client's intent to defer his payment and to use these funds for other, more pressing purposes. Thus, based upon the commingling alone, we would probably recomment a suspension of approximately one year. In our view, however, Respondent seriously compounded his wrongdoing by the evasions and misrepresentations he engaged in with the court and his client in an apparent effort to escape from the problems he had created for himself.

But for Respondent's lack of any prior disciplinary record, and the character evidence considered by the Hearing Committee, we would seriously consider recommending disbarment in the instant case. Under all the circumstances here, however, we recommend that

Respondent should be suspended from the practice of law for a period of two years.[18]

BOARD ON PROFESSIONAL RESPONSIBILITY

By /s/
Allen R. Snyder

July 17, 1981
Date

All Members of the Board concur in this opinion.

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[18] While it is extremely difficult to draw precise lines, or strictly to apply precedents, in recommending sanctions—since each case turns to some extent on its unique facts—we note that in our view Respondent's offenses here were more serious than those which justified an eighteen-month suspension in *In re Smith*, 403 A.2d 296 (D.C. App. 1979), but were somewhat less serious than those which justified a three-year suspension in *In re Haupt*, 422 A.2d 768 (D.C. App. 1980).

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket Nos.
312-79, 319-79

IN THE MATTER OF:
RICHARD ALLEN JAMES

REPORT OF HEARING COMMITTEE NUMBER NINE TO THE BOARD ON PROFESSIONAL RESPONSIBILITY

The above-captioned cases were heard on December 16, 1980, before Charles A. Miller, Esq., Chairman, Earl J. Silbert, Esq., Member, and Linda W. Cropp, Member, Hearing Committee Number Nine. The Office of Bar Counsel was represented by Martha J. Tomich, Assistant Bar Counsel. Respondent was not represented by counsel at the hearing but appeared *pro se*.

Proposed findings and conclusions and a supporting legal memorandum were submitted by bar counsel on January 16, 1981. Respondent's proposed findings and conclusions and supporting brief were forwarded on February 10, 1981, by Geoffrey P. Gitner, who was retained to represent respondent subsequent to the submission of bar counsel's proposed findings. On March 6, 1981, at the Committee's invitation, four letters or affidavits were submitted pertaining to respondent's prior record and reputation. Both sides have filed post-hearing motions to submit additional evidence, and respondent

has moved in the alternative to reopen the hearing. These matters are discussed in Part IV of this report.

While the two cases covered by this proceeding had separate origins, and the legal representations which they involve were largely unrelated, there are connections between the two matters and it is appropriate to treat them in a single report. The Committee's recommendation is based upon its review of the record as a whole and the overall performance and behavior of respondent during the time when the two representations were active.

Respondent is charged in Case No. 312-79 (the *Scott* case) with a conflict-of-interest in that he entered into a business transaction with his client in which their interests differed without obtaining his clients' consent based on full disclosure of all potential adverse interests. He is also charged with seeking an excessive fee.

In Case No. 319-79 (the *Coverdale* case) respondent is charged with dishonesty, fraud and misrepresentation, with conduct prejudicial to the administration of justice, with neglect of a legal matter entrusted to him, with intentional failure to seek his client's lawful objectives and to carry out his contract of employment to his client's prejudice, and with failing properly to maintain his client's funds in a separate account. This is the more serious case of the two. The crucial issue is whether respondent in effect misappropriated his client's funds by applying them to his fee knowing that his client thought the funds were being used to satisfy a consent judgment. Based on the conclusion that such a misappropriation has been established, bar counsel recommends that respondent be disbarred. If it is found that respondent's conduct in this case was unintentional but based on misunderstanding, bar counsel recommends a two-year

syspension. In addition, bar counsel seeks "restitution" to both the clients in both cases.

Respondent denies the essential charges, admitting only the possibility of a minor infraction in the *Coverdale* case. He asserts that he acted throughout in good faith and attempted to serve his client's interests. If a violation is found, he recommends that a formal reprimand is the appropriate remedy.

I. FINDINGS OF FACT.

No. 319-79 (*Coverdale* Case)

1. On or about September 13, 1978, John A. Stevenson, a/k/a John Marshall, a former tenant of Mrs. Louvenia A. Coverdale, filed a personal injury action against Mrs. Coverdale. Shortly thereafter, Mrs. Coverdale retained respondent to defend her. Mrs. Coverdale paid respondent a $500 retainer, and he filed an Answer to the Complaint for Damages on or about October 5, 1978. [BE 37(a); 37(b); 38(a); Tr. 127-28; 143-47]

2. Approximately one year later, on October 15, 1979, a praecipe was filed dismissing Mr. Stevenson's case. The praecipe stated the case had been settled for $1,250 and was signed by respondent on behalf of Mrs. Coverdale and by Michael Rankin, Esq., Mr. Stevenson's attorney. Neither Mrs. Coverdale nor Mr. Stevenson was a signatory to the praecipe. [BE 25(b)]

3. At the time the praecipe was filed, respondent advised his client that she would have to pay the settlement amount within 15 days. [Tr. 149, 157]

4. On or about October 15, 1979, respondent submitted to Mrs. Coverdale a bill in the amount of $1,500 for his services, over and above his original retainer.

Mrs. Coverdale then calculated that she owed a total of $2,750. [BE 27(a); 37(c); Tr. 128-31; 135; 147-49]

5. Mrs. Coverdale was unable to satisfy this entire debt at once. She therefore determined to satisfy it in installments of $400 per month, and she so informed respondent. It was Mrs. Coverdale's initial intention that the installments would be applied both to the settlement obligation and respondent's fee. [BE 29(a); 31(a); Tr. 128; 130]

6. Mrs. Coverdale was given no information about payment of the settlement amount, and she did not know the whereabouts of the plaintiff Stevenson. She therefore sent her installment checks to respondent, believing that he would arrange for payment to Mr. Stevenson. [BE 29(a); Tr. 128; 131]

7. After learning of Mrs. Coverdale's intentions, respondent contacted Mr. Stevenson's attorney, Mr. Rankin, and proposed that the settlement amount be paid at the rate of $100 per month. After consulting with Mr. Stevenson, Mr. Rankin advised respondent that this proposal was unsatisfactory and demanded full payment. [BE 25(a)]

8. Respondent in the interim had received Mrs. Coverdale's first check, which was for $350. On the face of the check she wrote that $300 of this amount was for respondent's fee and $50 was for the settlement. This division was made to equalize the balance of the two obligations. [BE 38(b); Tr. 129-30]

9. After receiving this check, respondent telephoned Mrs. Coverdale and informed her that Mr. Stevenson had rejected an installment payment proposal. Mrs. Coverdale restated her inability to pay the amount due at once. She proposed that her $400 per month pay-

ments be applied to the balance due on the Stevenson claim first until it was satisfied and thereafter to the balance due on respondent's bill. She thought that respondent had agreed to this arrangement and would implement it with Mr. Stevenson's counsel. Mrs. Coverdale thereafter made payments of $400 per month to respondent in December, January, and February. [BE 38(c); 38(e); Tr. 130-35]

10. Respondent took no further steps to work out a payment agreement with Mr. Stevenson's counsel. On November 19, 1979, Mr. Rankin withdrew as Mr. Stevenson's counsel, and respondent was aware of this. Respondent did not know how to contact Mr. Stevenson. [BE 25(a); Tr. 157-58]

11. Respondent deposited Mrs. Coverdale's first check, for $350, in his professional account, not his client escrow account. He likewise deposited Mrs. Coverdale's December and January checks in his professional account. He made no effort to make any payment against the settlement obligation. He did not inform Mrs. Coverdale that he was not transmitting any sums to Mr. Stevenson or that he was retaining all of the amounts paid by her to settle his fee bill. [BE 42-44; Tr. 160]

12. In December 1979 or January 1980, Daniel Slattery, Esq., was retained by Mr. Stevenson in connection with his tort claim. Mr. Slattery contacted respondent by telephone and stated that he would be filing a motion for relief from the judgment. Mr. Stevenson, whose reliability and motives seem suspect, had told Mr. Slattery that he thought the settlement amount was $12,500, not $1,250. Mr. Slattery may have mentioned this to respondent. [RE 4; 5]

13. In January 1980, Mr. Stevenson called Mrs. Coverdale to obtain payment of the settlement amount.

Mrs. Coverdale referred him to respondent, saying that she had forwarded payments to respondent that were due to Mr. Stevenson. Mr. Stevenson did call respondent, but the record does not reliably disclose what he was told by respondent. [BE 33; Tr. 132-33]

14. On or about February 5, 1980, Mr. Stevenson filed a complaint with the Office of Bar Counsel. The complaint was docketed as James/Stevenson, No. 319-79, and respondent was notified of the pending investigation by letter dated February 13, 1980. Mr. Stevenson's complaint, which was sent to respondent, contains a statement that Mr. Stevenson had spoken by telephone with respondent several weeks earlier at Mrs. Coverdale's suggestion and that respondent had promised to remit to him the amounts received from Mrs. Coverdale. Respondent answered the complaint by letter dated February 20, 1980. On or about February 10, 1980, respondent received from bar counsel the complaint in the *Scott* case (No. 312-79). [BE 2; 3; 25; 26; 27]

15. On or about February 15, 1980, Mrs. Coverdale and respondent had a telephone conversation about the amount of money she had sent to him. Thereafter, on or about February 18, 1980, Mrs. Coverdale sent respondent a letter confirming this telephone conversation and her agreement with respondent regarding the money she owed. Mrs. Coverdale enclosed with the letter another check issued to respondent in the amount of $400. On the front of this check Mrs. Coverdale noted: "Re: Att Fee & Plaintiff Acceptance Fee, Original cost for both $2,750^{00}, Bal for both $1,200^{00}." It appears that respondent deposited this check in his escrow account. [BE 27; 29(a); 38(c); Tr. 133-36; RE 3]

16. On February 20, 1980, a motion to set aside the settlement was filed on Mr. Stevenson's behalf by a new

attorney, Daniel Slattery, on the ground that the settlement amount had not been paid. On February 29, 1980, respondent filed an answer to this motion on behalf of Mrs. Coverdale, opposing the motion. [BE 37(e) and (f)]

17. The plaintiff's motion was scheduled to be heard on March 31, 1980. The hearing was continued to April 23 and then to April 30. On or about April 22, 1980, respondent wrote Mrs. Coverdale that "Mr. Stevenson has requested that the settlement be set aside and that his slip and fall case is set down for trial (sic) on April 28, 1980. . . ." Respondent further advised Mrs. Coverdale that her presence in Court was not necessary. The record is unclear as to whether respondent advised Mrs. Coverdale of the filing of the motion prior to his April 22 letter. She had been told by respondent that the motion was going to be filed, and respondent advised her, in light of this anticipated move, to suspend her monthly installment payments after February. [BE 27; 34; 37; Tr. 136-38]

18. At the hearing on the motion, respondent represented to the Court that Mrs. Coverdale had paid only $350 since the settlement, that this amount had been deposited into respondent's escrow account, that he had not received a payment from Mrs. Coverdale in three months, that she was unable to pay any faster, and that Mr. Stevenson was free to attach her property to enforce his judgment. Mr. Slattery, on behalf of Mr. Stevenson, argued that the settlement should be set aside because Mrs. Coverdale had breached her agreement to pay. Respondent agreed expressly that Mrs. Coverdale did not carry out the agreement, but he opposed the requested relief. The Judge twice stated that if the settlement amount ($1,250) were then paid, he would deny the motion. Respondent asked for 15 days to attempt to

raise the necessary amount, failing which he would pay it from his own funds "just to get rid of the case." This was objected to by Mr. Slattery. At no time did respondent offer to pay the settlement amount at once, nor did he inform the Court that the four payments made by Mrs. Coverdale to him since the settlement were sufficient to cover the entire settlement amount, nor did he inform the Court of the contents of Mrs. Coverdale's letter of February 18, 1980, nor of the fact that Mrs. Coverdale had ceased making monthly payments on respondent's advice. Based on the record before him, the Judge granted the motion to set aside the settlement. [BE 36; 37(g)]

19. Respondent informed Mrs. Coverdale by letter dated May 6, 1980, of the Court's ruling. On May 15, 1980, Mrs. Coverdale met with an Assistant Bar Counsel, at the latter's invitation, to discuss her situation. On May 20, 1980, Mrs. Coverdale discharged respondent and requested a full refund of the $2,050 she had paid to him. [BE 30; 31(a); 35; Tr. 137-39]

20. Thereafter, respondent wrote to Mrs. Coverdale, requesting a conference to discuss her correspondence of May 20, 1980. Mrs. Coverdale did not respond. [BE 39; Tr. 139-40]

21. On or about June 9, 1980, respondent again wrote to Mrs. Coverdale enclosing a check for $50 which respondent stated "represents money over and above the legal fee you paid to me." To date, Mrs. Coverdale has not cashed this check. [BE 39; 39(a); Tr. 140-41]

No. 312-79 (*Scott* Case)

22. At all relevant times, Walter and Sandra Scott have owned a residential dwelling located at 558 - 14th

Street, S.E., Washington, D.C. Although the building contains two units, the entire house has been occupied by the Scotts' tenant, Ms. Katie Morris and her family, since the summer of 1979. [BE 8(b); 15; Tr. 10; 15-17]

23. Mrs. Scott is the daughter of Mrs. Coverdale. The Scotts were aware of respondent's representation of Mrs. Coverdale, and in November 1979 the Scotts retained respondent to renegotiate the terms of their lease with Ms. Morris with the goal of eventually selling the property. The Scotts agreed to pay respondent $75 per hour and remitted a $500 retainer to him on or about November 12, 1979. [BE 8(d); Tr. 9-10; 12; 45-46; 49; 81-82; 97; 112]

24. On or about November 15, 1979, respondent prepared a Claim of Exemption Statement for the Scotts' signature which was filed with the District of Columbia Rental Accommodations Office (R.A.O.) on or about November 19, 1979, listing the property as having two units. [BE 16; Tr. 16; 99]

25. Subsequent to November 12, 1979, the utilities for the residence at 558 - 14th Street, S.E., were interrupted and Ms. Morris sued the Scotts. Mr. Scott contacted respondent who agreed to defend the Scotts in that lawsuit. [Tr. 10-12; 18-19; 47]

26. Respondent drafted a new lease and, with the Scotts' approval, submitted the proposal to Ms. Morris. Ms. Morris rejected the proposed lease. Respondent advised the Scotts that he had reached an impasse on renegotiating the lease. [Tr. 10; 14-15; 18]

27. On or about November 29, 1979, respondent, with the Scotts' approval, offered the property for sale to Ms. Morris at $70,000, pursuant to Section 601(a) of the District's Rental Accommodations Act. [BE 1(f); 18; Tr. 20-22]

28. On or about November 29, 1979, respondent, with the Scotts' approval, also offered to Ms. Morris, through her attorney, a monetary incentive in exchange for Ms. Morris' quitting the premises. Neither Ms. Morris nor her attorney answered respondent's letters of November 29, 1979. [BE 1(e); Tr. 21-23]

29. On or about December 2, 1979, the Scotts executed a contract for sale of the subject property with a third party at a purchase price of $55,000. Notice was not given to Ms. Morris. The Scotts did not inform respondent of this contract, and respondent was unaware of its existence until the Scotts later informed respondent of this contract in or around late December 1979 or January 1980. [RE 1; Tr. 53-54; 68]

30. Frustrated over his experience with the house, Mr. Scott suggested during December of 1979 that respondent purchase it. At that time respondent indicated that while he did not wish to purchase the house, he would consider it. [Tr. 23-24; 31-32; 46-48; 55; 83; 101]

31. Subsequently, during a conference on January 2, 1980, respondent presented the Scotts with two documents which he had prepared. One document was a contract for the sale of the 558 - 14th Street, S.E., property from the Scotts to respondent at a purchase price of $40,000, approximately the appraised value of the property. [BE 1(b); 8; Tr. 24-25; 82-83; 103]

32. The other document was a contract between respondent and the Scotts. Under the terms of this second contract, the Scotts were to convey the subject property to respondent. The proceeds, other than amounts needed to satisfy existing liens, were to be placed in a special account for use by respondent to

manage and improve the property. The agreement further provided that "upon later disposition and sale of the property," the net proceeds were to be divided equally between the Scotts and respondent. The Scotts and respondent further agreed not to disclose to third parties the existence of this second contract so as to avoid informing the tenant of the nature of the proposed transaction. [BE 8(b); Tr. 25; 33-35; 82-83; 102]

33. The Scotts reviewed both documents with respondent on January 2, 1980, for approximately one hour before executing them. The Scotts and respondent also altered their fee arrangement. Respondent's legal fee was to be satisfied from his 50 percent share of the profits on the sale of the house. [Tr. 25; 30; 88; 112; 114-15]

34. The parties have different recollections as to whether respondent suggested at the January 2 meeting that the Scotts consult independent counsel, but all agree that the Scotts were not then in a financial position to do so and were relying on respondent's advice and judgment. [BE 11; 12; Tr. 27-35; 50; 74-76; 86-89; 92; 118-19]

35. At the time the contracts referred to in paragraphs 31 and 32 were executed, Mr. Scott thought they were fair and did not think that they were fraudulent or surreptitious. Rather, he and Mrs. Scott thought respondent had come up with a "viable program." [Tr. 26; 32; 97-98; 101-03]

36. Mr. Scott described the contemplated title transfer to respondent as a straw sale, under which legal title would be held by respondent. Mr. Scott wanted the proceeds of the loan that respondent was to obtain to be placed in a "three-party escrow account," but he only expressed this wish to his wife, not to respondent. Mr.

Scott also understood that the first trust on the property was to be retired with a portion of this money. The balance of the loan, along with any rental income, would go to managing and rehabilitating the house once Ms. Morris had been relocated. After the house had been renovated, Mr. Scott understood that the property was to be listed for resale at an asking price of $125,000. Mr. Scott also understood that expenses of the renovation would be deducted from the resale proceeds and the net profit would then be divided equally between respondent and the Scotts. Lastly, Mr. Scott understood that the only provisions affecting the transaction between respondent and the Scotts were those contained in the documents described in paragraphs 31 and 32, above. [BE 8; Tr. 19; 25-33; 39; 82]

37. Mrs. Scott understood that under the two contracts, title to the property was to be transferred to respondent; respondent would also manage the property, collect the rent and obtain financing to rehabilitate the house. Mrs. Scott also contemplated that the house would ultimately be offered for resale and the profits divided between respondent and the Scotts. [Tr. 85-88]

38. The contract described in paragraph 32 did not establish a time frame for rehabilitating and reselling the property and did not expressly require that respondent ever sell the property. It did not provide for unanticipated contingencies, such as the failure to sell the property. [BE 8(b)]

39. On or about January 3, 1980, respondent wrote to Ms. Morris, notifying her of the contract of sale between himself and the Scotts, and her right of first refusal. [BE 1(a); 8; Tr. 20; 37-39; 113-14]

40. On or about January 29, 1980, Ann E. Wilson, Chief of Evictions for the R.A.O., informed respondent

that in her opinion the November 29, 1979, and January 3, 1980, notices to Ms. Morris did not meet the requirements of Section 602(a) of the Rental Accommodations Act and the R.A.O. would require the Scotts to serve a new notice. In addition, Ms. Wilson's letter stated "you will be unable to complete the settlement or seek an eviction until this matter is resolved." [BE 1; 1(c); 1(d); 8]

41. The position of the R.A.O. prevented consummation of the contracts described in paragraphs 31 and 32, and they were never carried out. [BE 8; 10; Tr. 35-37; 103-04]

42. As a result of the failure to consummate the contracts, the Scotts discharged respondent on or about February 14, 1980, and requested an itemization of his fees. On or about February 15, 1980, Mr. Scott filed anoter Claim of Exemption Form with the R.A.O., listing the subject property as having one unit. [BE 8; 8(a); 17; Tr. 20; 38-41]

43. On or about February 20, 1980, respondent informed the Scotts that the fee for his services and those of his staff would be $5,000 and asked them to execute an irrevocable assignment of funds. Respondent stated that in light of the Scotts' financial problems he would not expect his fee until the subject property had been sold. [BE 8; 8(e); 8(f); Tr. 41-43; 120]

44. To date, respondent has failed to provide an accounting of his fee to the Scotts or the Office of Bar Counsel. The subject property has not yet been sold and respondent made no additional request to the Scotts for his fee. However, in November 1980, respondent sued the Scotts in the District Court of Maryland for Prince Georges County for a fee in the amount of $5,000. On

or about December 29, 1980, the Scotts agreed to pay respondent $3,500 for the legal services he rendered to them in settlement of this suit. [BE 8; 13; 14; 40; Tr. 40-44; 88; 92; 117; 120-21]

45. Respondent testified that he and his staff rendered approximately 150 hours of work to the Scotts over a two- to three-month period. Those hours included time spent preparing the documents described in paragraphs 31 and 32, above. Respondent assessed the Scotts at an hourly rate of $75 for work done by his office. Respondent and his staff did not keep time records of the services provided to the Scotts. At the hearing on December 16, 1980, respondent produced no records in support of his fee and could only estimate the portion of work done by himself and that done by his law clerk. [Tr. 52; 61; 70; 72-74; 92; 98; 105-08; 115-17; 197]

II. CONCLUSIONS.

One of the ironies of this case is that two apparently independent complaints were filed against the same attorney at approximately the same time arising out of completely different legal transactions, and in neither case was the complaint filed by the respondent's client. In both cases, the complaint was filed by or on behalf of the adversary party. It may well be, as respondent argues, that these complaints were filed for the purpose of obtaining an advantage in connection with then pending legal matters. Nevertheless, the Board's duty is to evaluate the conduct of respondent as reflected in the record, without regard to who the complaining party was.

No. 319-79 (*Coverdale* Case)

The Committee believes that bar counsel has established by clear and convincing evidence that respondent's

conduct in this matter was reprehensible. Based on the entire record, it is clear to us that respondent knew that Mrs. Coverdale expected him to satisfy the settlement out of the funds that she was remitting to him periodically. Respondent did not do so. He then compounded his misconduct by allowing and even leading the Court to conclude that Mrs. Coverdale had basically defaulted in her obligation, thus causing the Court to vacate the settlement and to put Mrs. Coverdale at substantial risk of further loss.*

We are convinced that respondent acted deliberately or with gross negligence in declining to use Mrs. Coverdale's funds to satisfy her settlement, and that he was aware that his conduct was ethically questionable. Respondent's evasive and contradictory testimony did not rebut the clear and consistent account given by Mrs. Coverdale reflected in the findings set forth above. Respondent's letter to bar counsel, dated February 20, 1980, conceded that he received funds from Mrs. Coverdale "to be applied toward [the] judgment." [BE 27]. His letter of the same date to Mrs. Coverdale [BE 33], prepared at a time when he was aware that his conduct was under scrutiny, appears to be an effort to justify his failure to date to pass on Mrs. Coverdale's funds to the plaintiff. Respondent's decision to return $50 to Mrs. Coverdale on June 9, 1980, after he had been discharged by Mrs. Coverdale and had received a second inquiry from bar counsel, appears also to reflect his awareness that his conduct was improper. [BE 39]

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* Fortunately for Mrs. Coverdale, it appears likely that her exposure to additional liability has been extinguished. Both the plaintiff in the tort action, Mr. Stevenson, and his girlfriend and apparent sole witness, have died, and there is apparently no way that a case of liability can be made.

Respondent's basic defense is twofold: (1) he had no obligation to assist Mrs. Coverdale in satisfying the settlement obligation, and (2) he had received a phone call from an unidentified attorney claiming that Mr. Stevenson thought the settlement amount should have been $12,500. The first justification is belied by respondent's actions in attempting to negotiate for Mrs. Coverdale an installment repayment arrangement and by his later explanations that he failed to remit Mrs. Coverdale's funds because he did not know to whom to send them.

His account concerning the mysterious phone call is contradictory and uncorroborated.* Even if respondent had received the call in question, it does not explain nor justify his converting funds intended for the plaintiff to his own use.

The Committee believes that respondent's performance before Judge Fauntleroy was especially egregious. The hearing was held in late April 1980. Respondent therefore had ample time to investigate the facts, if that was necessary. He had had for over two months Mrs. Coverdale's letter of February 18 [BE 29(a)], which clearly set forth her understanding of the funds she had transmitted to respondent. Respondent never challenged Mrs. Coverdale's February 18 letter. Yet he never advised the Court of Mrs. Coverdale's understanding of the situation as reflected in her letter, and he directly represented to the Court that she had failed to pay the settlement

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* Respondent, through newly retained counsel, has sought to reopen the record to include certain affidavits apparently intended to support respondent's account of the phone call from an unidentified source. [RE 4; 5]. However, these proffered exhibits permit only the slimmest of inferences and do not substantially support respondent's story.

amount. He also seriously misstated the extent to which she had paid funds to him (he referred to one $350 payment when, in fact, by that time he had received $1,500 from Mrs. Coverdale in periodic payments), and he never told the Court that Mrs. Coverdale had ceased making payments on his advice. Judge Fauntleroy repeatedly stated that he would not vacate the settlement if Mrs. Coverdale would immediately satisfy it. Despite having received from Mrs. Coverdale more than enough funds to satisfy the judgment and knowing that Mrs. Coverdale thought these funds would be used to satisfy the judgment, respondent suppressed these facts, and by his conduct induced the Court to vacate the settlement and reinstate the claim against Mrs. Coverdale.

Furthermore, respondent then gave a highly misleading account of the Court's action to Mrs. Coverdale [BE 35], asserting that the judgment was reopened because the Court felt the "money should have been paid within 15 days after settlement." Respondent failed to inform Mrs. Coverdale that Judge Fauntleroy was willing to deny the motion were the settlement satisfied.

The Committee is aware that respondent's account, to the extent it can be comprehended, differs from that of Mrs. Coverdale. However, the Committee has no hesitancy in concluding that Mrs. Coverdale's testimony is to be credited and respondent's is not. Mrs. Coverdale is a former Assistant Principal in the District of Columbia public school system. [Tr. 126]. Though close to 70 years of age, she appeared to be in full possession of her faculties. She bears no apparent grudge against respondent. She did not initiate the complaint against him and supplied information to bar counsel only at the latter's request. Moreover, her account is corroborated in all significant respects by other evidence of record.

By contrast, respondent's testimony was highly evasive, inconsistent, and frequently non-responsive. His story was inherently unbelievable in many respects, and he contradicted himself on numerous occasions. The Committee is unable to place any reliance on his account of the matters in dispute. Even his written accounts, reflected in BE 27 and 33, cannot be squared with his testimony at the hearing.

The Committee concludes that each of the charges contained in the complaint have been established by clear and convincing evidence. In particular, respondent violated Disciplinary Rule 1-102(A)(4) by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation. Respondent's conduct involved each of the four listed prohibited acts. Respondent's overall performance, and in particular his conduct before Judge Fauntleroy on the motion to set aside the settlement, was prejudicial to the administration of justice in violation of Disciplinary Rule 1-102(A)(5). By not applying Mrs. Coverdale's funds to the settlement,* respondent violated Disciplinary Rule 6-101(A)(3) by neglecting a legal matter entrusted to him, and Disciplinary Rule 7-101(A)(1-3) by intentionally failing to seek the lawful objectives of his client through reasonably available means, by failing to carry out a contract of employment for legal services, and by prejudicing his client during the course of his professional relationship. Finally, respondent violated Disciplinary Rule 9-102(A) by

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* Whether or not it is true, as respondent alleges, that he could not forward Mrs. Coverdale's funds because he did not know the whereabouts of plaintiff or his lawyer, this does not excuse respondent's failure to proffer Mrs. Coverdale's funds in response to Judge Fauntleroy's repeated statement that such a proffer would cause him to deny the motion to vacate the settlement.

failing to maintain Mrs. Coverdale's funds in an identifiable account separate from his own professional account.

No. 312-79 (*Scott* Case)

This case presents no significant factual dispute. The question is one of interpretation of conceded facts.

Two interpretations are conceivable: (1) that respondent was intent on cheating the Scotts out of their property; (2) that respondent was genuinely attempting to help the Scotts and was merely sloppy and insensitive to the need to make appropriate arrangements given his relationship with them.

The Committee adopts the second interpretation. If respondent did harbor fraudulent designs, they were not apparent. The Scotts did not think at the time that respondent had improper motives and still do not think so. They discharged him because the actions of the Rental Accommodations Office, for which respondent arguably bore some responsibility, had frustrated their intended transaction.*

However, respondent was clearly inattentive to his responsibilities. In so concluding, we recognize that it was not inappropriate in the circumstances for respondent to have made a business arrangement with the Scotts. The arrangement seemed in general to be in their best interests. We also think it is essentially irrelevant whether or not respondent urged the Scotts to seek independent counsel. That would not have been necessary had respondent fully discharged his obligations, and if they

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* No question has been raised about the competence of respondent in connection with the filings with the Rental Accommodations Office.

had done so it would not have excused respondent's failure to meet his responsibilities.

Respondent had an obligation to be scrupulous in his dealings with his clients so as to avoid any appearance or possibility of taking advantage of them. While he may not have intended to take advantage of the Scotts, he did not take care to avoid the possibility. The contract that he drafted made no provision for such contingencies as the inability to dispose of the property as contemplated, and the transfer of legal title to respondent subjected the Scotts to substantial risks in the event that respondent died, became incapacitated, or found himself in financial difficulties.

Under all the circumstances, the Committee believes that respondent's conduct constituted a violation of Disciplinary Rule 5-104(A) in that he entered into a business transaction with his clients where the clients expected him to exercise his professional judgment for their protection, without making full disclosure to them of the risks involved. Had another client brought to respondent the contract he proffered to the Scotts and asked him for his advice, respondent would have been expected to counsel against entering into the transaction on the basis of the documents as drafted.

Disciplinary Rule 2-106(A) states that a lawyer shall not charge a "clearly excessive" fee. In this case respondent's fee arrangement with the Scotts was $75 per hour with a $500 retainer. We do not believe that this was an excessive rate for respondent's time. We observe that respondent's apparent practice is to charge $75 per hour for the time devoted to a case by his office, which includes the time of his law clerk. We believe that $75 per hour is clearly excessive for a law clerk. However, it does not appear that respondent in fact based his bill to the Scotts on this rate for his law clerk.

Subsequent to being discharged, respondent rendered a bill to the Scotts for $5,000. He testified at the hearing that his office devoted between 100 and 150 hours to the matter, although his bill, at the rate of $75 per hour, reflects charges for approximately 73.3 hours (taking into account the $500 retainer). Considering the period of the representation (less than three months), the poor outcome,* and the fact that some of the time was spent on arrangements for a transaction in which respondent stood to benefit, there is at least a question whether his performance merited a fee of $5,500. We are also concerned that the rendition of the bill for $5,000 may have been retaliatory as a result of being discharged by the Scotts. [Tr. 104]

But the real concern in this area is with respondent's office procedures and his inability to account for his time. Although he quoted a rate of $75 per hour to the Scotts at the time he was retained, he at no time had any office procedures or system for recording his time. Thus, there was no way in which he could establish the hours spent on any particular matter. He conceded that he had no way of knowing with any degree of specificity how much time he devoted to the Scotts' affairs. [Tr. 105-07; 115]

Moreover, we cannot condone respondent's stated position at the hearing that if forced to itemize his bill to the Scotts he would double it to $10,000. [Tr. 117]

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* Whether or not the actions of the Rental Accommodations Office that frustrated the transaction were the fault of respondent, it is clear that his handling of the Scotts' submissions to that Office was not impressive. He filed a notice of exemption under one section of the law and later gave the notice required by a different section, which apparently triggered the Office's actions. [Tr. 104-05]

We conclude that respondent's $5,000 bill was, in the circumstances, most inappropriate, and it may well have met the standard of "clearly excessive." However, the discipline recommended in this report is not predicated on a finding of a violation of Disciplinary Rule 2-106(A).

III. DISCIPLINE

Our recommendation is based on the entire record and is influenced by respondent's approach to this proceeding. He was totally unprepared for the hearing, despite having received ample notice. He made no effort even to retrieve pertinent documents from his files, including those he claimed would support his defense, and he apparently did not seek out any corroborating evidence.*

Respondent's cavalier attitude about this proceeding mirrors his manner of representing his clients, as reflected on the record in this case. Moreover, his undisciplined, rambling and often contradictory account of the facts, particularly in the *Coverdale* case, does not reflect a habit of care and concern in the handling of his client's affairs.

Most significantly, respondent seems not to be aware of his responsibility as a lawyer faithfully to uphold his client's interests so long as he is acting on a client's behalf. His repeated expression that he had no responsibility for assisting Mrs. Coverdale in satisfying the settlement judgment is a forceful indication of this tendency.

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* After bar counsel's proposed findings were submitted, respondent retained counsel who subsequently presented several affidavits to support respondent's defense. These are the subject of a motion to reopen the record or to admit additional evidence.

Overall, respondent gives the impression of an attorney with an insufficient appreciation of his duties under the Canons of Ethics.

Notwithstanding this, if we were confronted only with the *Scott* case, we would not contemplate severe discipline. We think respondent was trying to help the Scotts out of a difficult situation. Both Mr. Scott, a printer with the Department of Defense, and Mrs. Scott, a schoolteacher, thought so. They appeared to have a reasonable understanding of what respondent proposed to do, and they supported his approach. While respondent's handling of their affairs did not comport with the requirements of the canons, we prefer to think that a relatively modest sanction would have brought home to respondent his obligations as an attorney to conform to the Canons of Ethics and his duty faithfully to protect and advance the interests of clients that are entrusted to him.

But respondent's behavior in the *Coverdale* case adds a different dimension to the case. There, respondent evidenced a readiness and willingness to sacrifice his client's interests for his own personal gain, and even to be the instrument of that sacrifice. We cannot condone this behavior. Not only does it bring disrepute on the Bar as a whole, it subjects those who place trust in attorneys to the risk of prejudice and loss through abuse of that trust.

For these reasons, we conclude that the appropriate discipline in this case should be suspension from practice for one year and one day. The Committee gave careful consideration to the recommendation of bar counsel that respondent either be disbarred or be suspended for a two-year period. We think disbarment is too harsh in the circumstances, for we think that there is a prospect

that respondent could, after an appropriate period of discipline and recommitment to the standards of practice in this jurisdiction, make a substantial contribution to the Bar and the public. We recognize that suspension for a greater period than that recommended might be justified on the facts set forth above. The Committee has concluded, however, that the interests of justice would not be served by any greater suspension. The Committee feels quite strongly, however, that respondent demonstrate proof of rehabilitation before he is permitted to resume practice in this jurisdiction, and for this reason believes that suspension for a year and a day is the minimum appropriate sanction.

We have also considered the recommendation of bar counsel for restitution. Section 3 of Rule XI of the District of Columbia Court of Appeals permits an order of restitution to persons financially injured by the conduct of the respondent attorney. We do not think that there has been such injury in this case. Accordingly, no restitution is recommended.*

In reaching its recommendations, the Committee has reviewed decisions in other cases, including those cited in the briefs of the parties. We have found no case that is closely analogous on the facts. However, we do believe that the suspension recommended is consistent with discipline imposed in other cases involving similar charges.

In particular, in *Matter of Fogel*, M-35-80 (D.C. 1980), the respondent was suspended for a year and a

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* Respondent should reimburse Mrs. Coverdale for the $50 received in excess of his fee. He sent Mrs. Coverdale a check in that amount in June 1980. However, that check was never cashed and would now undoubtedly be dishonored. He should be required to send Mrs. Coverdale a new check in that amount.

day for neglect, intentional failure to carry out his obligations to his client and deceitful conduct. While the facts are substantially different, in nature and severity the misconduct in that case is like that of the present case. *Matter of O'Bryant,* M-40-80 (D.C. 1980), and other cases cited in that decision all involve misrepresentations involving fees. In all three cases suspensions of less than one year were ordered. Mrs. Coverdale's case involves an element of misrepresentation about fees, but in the Committee's view the additional elements of neglect and intentional failure to carry out the client's lawful objectives warrant a more severe sanction.

We have also considered *Matter of Haupt,* M-36-80 (D.C. 1980) which involved a three-year suspension for a series of improper actions that were described by the Board as representing a "callous disregard" for clients as well as "an almost total lack of understanding of the ethical code." Likewise, *Matter of Smith,* 403 A.2d 296 (D.C. 1979), in which an 18-month suspension was imposed, there had been a combination of neglect and misconduct. We do not think that respondent's conduct was as reprehensible on a continuing basis as that involved in the *Haupt* case, and we are inclined to think that respondent did not display the same degree of neglect of his client's interests as was involved in the *Smith* case.

Respondent relies most heavily on *In re Dwyer,* DN 374-78/356/78 (B.P.R. 1980). There respondent was suspended for three months upon a finding of neglect and co-mingling of funds. However, the Board concluded in that case that there had been no acts of misrepresentation or dishonesty. Respondent argues that he likewise did not engage in such acts. Since the Committee has found otherwise, the *Dwyer* case does not point the way to our conclusion.

Finally, we have taken into consideration the letters supplied by respondent's counsel from four members of the Maryland bar offered in mitigation. Each letter attests to respondent's reputation in the legal community and to his competence as an attorney.* These letters have helped to persuade us that a suspension for no more than the minimum period necessary to require proof of reinstatement is sufficient in this case. However, they do not overcome the evidence of misconduct, which to this Committee strongly supports the conclusion that a showing of rehabilitation should precede respondent's resumed practice in this jurisdiction.

IV. MOTIONS TO RECEIVE ADDITIONAL EVIDENCE

Bar counsel has moved to admit additional evidence [BE 40-44]. Bar Exhibit 40 is a letter from respondent advising of the settlement of the fee dispute with the Scotts. Bar Exhibit 41 relates to the existence of a building at an address in Washington. Bar Exhibits 42-44 are copies of respondent's bank records. No objection has been interposed by respondent. The exhibits are all relevant (with the possible exception of Exhibit 41). The motions are granted, and the additional exhibits are received in evidence.

Respondent has moved to admit additional evidence or in the alternative to reopen the record. Seven exhibits are offered. Bar counsel opposes the motion.

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* On March 21, 1981, the Chairman of the Committee received two additional statements from respondent's counsel—one from a client, and one from a district court judge in Maryland attesting to respondent's competence and integrity.

RE-2 is an appraisal referred to in the testimony. [Tr. 102]. It will be received.

RE-3 is a copy of a page from respondent's bank statement. It is proffered to show that Mrs. Coverdale's February 18 check for $400 was deposited in respondent's escrow account. The account does show a deposit of $400 on February 21, but the deposit is not identified. Moreover, the record shows a withdrawal of $400 on February 27. While this exhibit will be received, it is not the best evidence of the fact sought to be proved. Bar counsel had sought to obtain the actual deposit records from the bank, but was apparently unsuccessful.

RE-4 is an affidavit of Michael Rankin, attorney for Mr. Stevenson at the time the settlement was made. Paragraphs 1-5 will be received. Paragraph 6, relating to Mr. Rankin's impressions of Mr. Stevenson and certain charges brought by Mr. Stevenson against Mr. Rankin, is not received since there is no showing that respondent was aware of the matters there contained or that they had any bearing on his behavior.

RE-5 is an affidavit of Daniel Slattery concerning his dealings with Mr. Stevenson and respondent. It is received, although we question the probative value of paragraphs 4 and 5.

RE-6, an affidavit of Bernard Crane, is received as rebuttal to Bar Exhibit 41.

RE-7, an unsworn statement of Terry McGill, is virtually worthless in light of Mr. McGill's admittedly poor recollection and the absence of supporting records. Moreover, if it is correct that respondent consulted an investigator in the fall or winter of 1979 to locate a building on Hayes Street (the last known address of Mr. Stevenson), it would tend to undermine respondent's position since it would show that he felt some obligation

to locate Mr. Stevenson. In any event, since the statement is unsworn, it will not be received.

RE-8 is the criminal record of Mr. Stevenson. In the absence of any showing that respondent was aware of this record at the pertinent time or that it had any bearing on his actions, this exhibit will not be received.

In light of the foregoing, there is no need to reopen the hearing, and that portion of respondent's motion is denied.

Respectfully submitted,

HEARING COMMITTEE NUMBER NINE

/s/ Charles A. Miller
Chairman

/s/ Linda W. Cropp
Member

/s/ Earl J. Silbert
Member

APPENDIX D

D.C. RULES ANNOTATED

RULE XI. DISCIPLINARY RULES.

* * *

Section 2. *Grounds for discipline.* The license to practice law in the District of Columbia is a continuing proclamation by the Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law.

Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the attorney's oath of office or the Code of Professional Responsibility as from time to time is in effect in the District of Columbia, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

Conviction of a crime shall similarly be grounds for discipline as set forth in § 15 of this Rule.

* * *

Section 7. *Procedure.*

(1) Investigation. All investigations, whether upon complaint or otherwise, shall be initiated and conducted by Bar Counsel. Upon the conclusion of an investigation, Bar Counsel may dismiss, informally admonish the attorney concerned, or institute formal charges upon prior

approval of an attorney member of a hearing committee; provided, however, that the respondent-attorney, following an informal admonition, may demand a formal hearing before a hearing committee, in which event the admonition shall be vacated. If Bar Counsel and the reviewing member of the designated hearing committee disagree as to the disposition of the case, the case shall be submitted to the full hearing committee on which the member serves for a probable cause hearing. If that committee finds probable cause, it shall refer the matter to the Chairman of the Board for assignment to another hearing committee for a formal hearing. If the original committee does not find probable cause, it shall dismiss the action subject to the right of Bar Counsel to seek review by the Board.

(2) Formal hearing. Formal disciplinary proceedings before a hearing committee shall be instituted by Bar Counsel by the filing of a petition with the Board (with a copy to the Clerk of the Court) which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the petition shall be served upon the respondent. The respondent shall serve a copy of his answer upon Bar Counsel and file the original with the Board within 20 days after service of the petition, unless the time is extended by the Chairman. In the event the respondent fails to answer, the charges shall be deemed admitted, provided, however, that a respondent who fails to answer within the time provided may obtain permission of the Chairman to file an answer if the failure to file an answer was attributable to mistake, inadvertence, surprise, or excusable neglect.

Following service of the answer or upon failure to answer, the matter shall be assigned by the Chairman to a hearing committee.

A hearing committee member who has reviewed Bar Counsel's recommended disposition of a matter, as set forth in paragraph (1) of this section, shall not take part in any formal disciplinary proceeding regarding the same matter, except for the probable cause hearing referred to in paragraph (1).

If there are any issues of fact raised by the pleadings, or if the respondent requests the opportunity to be heard in mitigation, the hearing committee shall serve a notice of hearing upon Bar Counsel and the respondent, or his counsel, stating the date and place of the hearing at least 15 days in advance thereof. The notice of hearing shall advise the respondent that he is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence in his own behalf.

The hearing committee shall in every case submit a report containing its findings and recommendation, together with a record of its proceedings and briefs, if any were submitted, to the Board within 60 days after the conclusion of its hearing. In the event of a hearing committee's noncompliance with this provision, the Board, in its discretion, may so advise the Court and request intercession by the Court.

(3) Review by the Board and Court. Upon receipt of a report from a hearing committee, the Board shall set the dates for submission of briefs and for oral argument before the Board. If neither the respondent nor Bar Counsel objects to the findings and recommendation of the hearing committee, oral argument and the submission of briefs may be waived by stipulation, subject to the approval of the Board. The Board shall promptly after the conclusion of oral argument or waiver thereof either affirm or modify the recommendation of the hearing committee, remand the matter for further proceedings

before the hearing committee, or dismiss the petition. In the event the Board determines that the proceeding shall be concluded by reprimand, it shall instruct Bar Counsel to so notify the respondent in writing.

Unless the Board shall dismiss or remand the petition or the matter is concluded by reprimand, the Board shall promptly submit a report containing its findings and recommendation, together with the entire record, to the Court. After the filing of the report, a copy thereof shall be served on the respondent. The respondent may file exceptions to the report within 20 days from the date of service of a copy thereof, or within an additional period not to exceed 20 days granted by this Court for good cause shown.

If exceptions to the report are filed by the respondent, the Court shall schedule the matter for the submission of briefs and oral argument in accordance with the general rules governing civil appeals. Upon conclusion of the proceedings, or upon consideration of the report if no exceptions thereto are filed by the respondent, the Court shall enter an appropriate order as soon as the business of the Court permits. In considering the appropriate order, the Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.

Proceedings before the Board and proceedings, if any, before the Court shall be conducted by Bar Counsel.

The Court reserves the right with respect to all disciplinary proceedings in which a dismissal, informal admonition, or reprimand is contemplated or effectuated

to review the matter and to enter an appropriate order with respect thereto, including an order directing further proceedings.

* * *

CODE OF PROFESSIONAL RESPONSIBILITY

* * *

DISCIPLINARY RULES

* * *

DR 1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law.*

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.**

* * *

DR 5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

* * *

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

* * *

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

* * *

DR 9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

* * *

APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket Number: 319-79

IN THE MATTER OF:
RICHARD A. JAMES, ESQUIRE
Office:
115 Center Way
Greenbelt, Maryland 20770
Respondent

PETITION INSTITUTING FORMAL DISCIPLINARY PROCEEDINGS

A. This Petition (including the attached Specification of Charges which is made a part of this Petition) notifies the Respondent that disciplinary proceedings are instituted pursuant to Section 7(2), of Rule XI, of the Rules of the District of Columbia Court of Appeals (Rule XI).

B. Respondent is an attorney admitted to practice before the District of Columbia Court of Appeals on the date stated in the caption of the Specification of Charges.

C. A member of a hearing committee assigned by the Board pursuant to Section 4(3)(d) of Rule XI, has approved the institution of these disciplinary proceedings.

D. Under section 7(2) of Rule XI:

(a) *Filing Answer* – Respondent must answer the Specification of Charges within twenty days of the date

of service shown on page 3 of this Petition, unless the time is extended by the Chairman of the Board on Professional Responsibility. The Answer must be filed at the address shown on page 3 of this Petition. The failure to file a timely answer shall be deemed an admission of all charges.

(b) *Content of Answer*—The Answer may be a denial, a statement in exculpation, or a statement in mitigation of the alleged misconduct. The charges not rebutted by the Respondent shall be deemed admitted.

(c) *Referral to Hearing Committee*—Upon receipt of the Answer or the expiration of time for Answer, whichever is sooner, this matter will be presented to the Board's Chairman for referral to a Hearing Committee.

(d) *Mitigation*—Respondent has the right to be heard by the Hearing Committee in mitigation regardless of whether the substantive allegations of this Petition are admitted or denied.

(e) *Process*—Respondent is entitled to fifteen days' notice of the time and place of hearing, to be represented by counsel, to cross examine witnesses and to present evidence.

E. These proceedings are confidential to the extent specified in section 23 of Rule XI.

F. In addition to the procedures contained in Rule XI, the Board on Professional Responsibility has promulgated Board Rules relating to procedures and the admission of evidence which are applicable to these proceedings. A copy of such rules is furnished Respondent with his copy of this Petition.

WHEREFORE, the Office of Bar Counsel requests that the Board consider whether the conduct of Respondent has violated the standards governing the practice of law

in the District of Columbia and, if so, that it further consider the imposition of such discipline as may be warranted.

Office of Bar Counsel

By: /s/ Martha J. Tomich
Assistant Bar Counsel

515 - 5th Street, N.W.
Building A
Washington, D.C. 20001
Telephone: 638-1501

CERTIFICATE OF SERVICE

A copy of this Petition with the Specification of Charges attached to it and a copy of the Rules of The Board were sent to the Respondent at the office address shown in the caption to this Petition by certified mail #PO2 6205121 on July 16, 1980. Also sent regular mail.

/s/ Martha J. Tomich
Assistant Bar Counsel

REFERRAL TO HEARING COMMITTEE

This matter is referred to a Hearing Committee for formal disciplinary proceedings.

By direction of
Lawrence J. Latto, Chairman

Board on Professional Responsibility
D.C. Court of Appeals, Washington, D.C.

Docket Clerk

Date:

Copy to: Hugh Kline, Acting Clerk
District of Columbia Court of Appeals

MJT:el

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD ON PROFESSIONAL RESPONSIBILITY

Bar Docket Number: 319-79

IN THE MATTER OF:
RICHARD A. JAMES, ESQUIRE
Bar Number: 951160
Date Admission: May 31, 1978
Respondent

SPECIFICATION OF CHARGES

The disciplinary proceedings instituted by this Petition are based upon conduct which violates the standards governing the practice of law in the District of Columbia as prescribed by Rule X of the District of Columbia Court of Appeals. The conduct and the standards which Respondent violated are:

1) In or about August 1978, Ms. Lovennia A. Coverdale retained respondent at a fee of $500.00 to defend her in a personal injury lawsuit filed in D.C. Superior Court as *Stevenson v. Coverdale*, C.A. No. 9636-78.

2) On October 15, 1979, a consent praecipe, executed by respondent and the plaintiff's attorney was filed and the action dismissed. That same day respondent prepared a bill for his services, reflecting a balance due of $1500.00 and submitted it to Ms. Coverdale.

3) Subsequently, Ms. Coverdale informed respondent that she was unable to remit the $1250.00 settlement in a lump sum but would make monthly payments of $400.00. Respondent told Ms. Coverdale that he would

inform the plaintiff of this arrangement. Respondent then agreed to receive the monthly installments from Ms. Coverdale and disburse the money to the plaintiff. Respondent further indicated to Ms. Coverdale that he would defer collecting his fee until the settlement had been paid in full.

4) In the course of Bar Counsel's investigation respondent denied that he agreed to defer his fee until the settlement was satisfied. This statement was false and respondent knew or should have known it was false.

5) Respondent then told the plaintiff's attorney that Ms. Coverdale could not remit the settlement in a lump sum but would pay $100.00 per month until it was satisfied. Respondent was advised that the plaintiff refused that offer and demanded immediate payment. Respondent never informed Ms. Coverdale that the plaintiff had rejected a proposal for monthly payments.

6) Between November of 1979 and February of 1980, Ms. Coverdale forwarded $1550.00 to respondent. Respondent, however, did not promptly apprise the plaintiff that Ms. Coverdale was making monthly payments nor did respondent distribute any money to the plaintiff. Instead he applied most of the $1550.00 to his fee.

7) On February 29, 1980 plaintiff filed a Motion for Relief From Order requesting the Court to set aside the settlement entered on October 15, 1979 and permit the plaintiff to proceed to trial. In opposing this motion on behalf of Ms. Coverdale, respondent represented to the Court that he had been unaware of the plaintiff's whereabouts. That statement was false and respondent knew or should have known that it was false.

8) On April 30, 1980, the Court granted the plain-

tiff's Motion to set aside the Court's Order of October 15, 1979 which had dismissed the case as settled.

9) In the course of Bar Counsel's investigation respondent stated that following the settlement in October of 1979, he was notified that the plaintiff believed the settlement was for $12,500.00 not $1,250.00. Respondent further stated that he informed Ms. Coverdale of this development and advised her that none of the settlement money should be disbursed until a motion for new trial had been filed. Respondent also told Bar Counsel that he had "never known the plaintiff's whereabouts". The latter two statements were false and respondent knew or should have known that they were false.

10) Respondent violated the following provisions of the District of Columbia Code of Professional Responsibility:

(a) Disciplinary Rule 1-102(A)(4) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation as alleged in paragraphs 3, 4, 5, 6, 7 and 9;

(b) Disciplinary Rule 1-102(A)(5) by engaging in conduct prejudicial to the administration of justice as alleged in paragraph 7;

(c) Disciplinary Rule 6-101(A)(3) by neglecting a legal matter entrusted to him as alleged in paragraphs 5 and 6;

(d) Disciplinary Rules 7-101(A)(1)(2) and (3) by actions evidencing an intentional failure to seek his client's lawful objectives and to carry out his contract of employment to his client's prejudice or damage as alleged in paragraphs 5, 6 and 8; and

(e) Disciplinary Rule 9-102(A) by failing to main-

tain his client's funds in a local identifiable bank account as alleged in paragraph 6.

PROBABLE CAUSE OATH

Upon information and belief, the undersigned states, under oath, that probable cause exists to refer the foregoing charges to a hearing committee.

/s/ Martha J. Tomich
Assistant Bar Counsel

Subscribed and sworn before me this 2nd day of July, 1980.

/s/ Fred Grabowsky
Bar Counsel

(Pursuant to authority vested in me by Rule XI, Section 13 of the Rules promulgated by the District of Columbia Court of Appeals for the governance of members of this Bar)

APPENDIX F

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

December 9, 1980

Martha J. Tomich, Esq.
Assistant Bar Counsel
The Board on Professional
Responsibility
515 Fifth Street, N.W.
Building A, Room 127
Washington, D.C. 20001

Richard A. James, Esq.
115 Center Way
Greenbelt, Maryland 20770

Re: *Bar Docket No. 312-79*

Dear Ms. Tomich and Mr. James:

In preparation for the hearing in the above-captioned docket to be held on Tuesday, December 16, 1980, at the office of The Board on Professional Responsibility, 515 Fifth Street, N.W., Washington, D.C., I have spoken with Ms. Tomich and asked her to consult with Mr. James on certain procedural matters. Ms. Tomich has advised me that she has had a conversation with Mr. James, who indicates that he will not object to the admission of the exhibits previously distributed by Bar Counsel, with the exception of Exhibit Nos. 25 and 28. According to Ms. Tomich, Mr. James further states that he may offer one additional document in evidence. If this is so, I request that Mr. James make copies of this document available to Ms. Tomich and to members of the Hearing Commit-

tee as quickly as possible, and in any event no later than Friday, December 12, 1980. If the documents are made available to Ms. Tomich, I believe she can arrange for delivery of them to members of the Hearing Committee.

The Committee's intention will be to hear the two cases successively. This means that after hearing Bar Counsel's witnesses on the first case, we will hear all evidence to be offered by Mr. James and conclude the taking of the evidence on this case before hearing the witnesses and receiving the evidence on the second case. The order of the cases to be heard shall be determined by Bar Counsel who should notify the Committee members and Mr. James in advance of the hearing, and in any event no later than Friday, December 12, 1980. Bar Counsel should also make arrangements so that the public witnesses in the second case need not be present at the beginning of the hearing but only when it is estimated that the hearing on the second case will begin.

I ask both Ms. Tomich and Mr. James to inform us by Friday, December 12, 1980, of the names of all witnesses to be called at the hearing. Notice to the Committee may be accomplished by mail to me.

In reviewing the file available to date, certain questions occur to me, which I have listed below in the hope that they can be dealt with during the hearing. This does not necessarily represent an exhaustive list of all questions nor do I mean to imply any advance judgments about the case or about the significance of the questions listed. This is simply to aid the parties in developing a full record.

The Case Involving Property of the Scotts

1. Were there one or two contracts of sale for the property? What is the relationship between the contract

reflected in Exhibit 1(b) and the contract reflected in Exhibit 8(b)?

2. Are there one or two rental units in the Scotts' property? If there are two, was the second unit occupied during any part of the period in question?

3. Why did the Scotts and Mr. James not go forward with their agreement to transfer the property to Mr. James?

4. When did Ms. Morris file suit against the Scotts? What role did the Scotts ask or expect Mr. James to play in defense of the suit, and what role did Mr. James play?

5. Did Ms. Morris purchase the property pursuant to the offer reflected in Exhibit 8(c)? If not, has the property otherwise been disposed of?

6. Was it part of the original arrangement between the Scotts and Mr. James that Mr. James might acquire the property, be responsible for refurbishing it, and share in the proceeds of eventual sale?

7. What are the answers to the questions raised in Bar Counsel's letter of October 3, 1980 (Exhibit 13)?

8. A legal question—is there a right of first refusal under Section 602 of the Rental Accommodations Statute in favor of the tenant(s) after the landlord has received a valid sales contract or other written offer to purchase?

The Case of the Stevenson-Coverdale Litigation

1. What were the exact time, amount, and manner of Ms. Coverdale's payments to Mr. James?

2. What use or disposition has been made by Mr. James of the payments from Ms. Coverdale?

3. Itemize the time spent on the litigation by Mr. James.

4. What instructions did Mr. James have from Ms. Coverdale concerning the settlement of the litigation? What did Mr. James tell Ms. Coverdale about the settlement and the obligations it imposed on her after the agreement was reached?

5. What was Ms. Coverdale's understanding as to how the funds she paid to Mr. James would be disbursed? What instructions, if any, were given to Mr. James, when and in what manner?

6. What has happened to the reopened litigation?

7. What is the effect of the Judge's order reopening the case on the settlement agreement?

In light of the fact that there are two separate matters to be considered at the hearing, I think it appropriate that the issue of the appropriate discipline, if any, should be deferred until after the Committee makes a determination on the question of liability. If either Ms. Tomich or Mr. James disagrees with this view, please so inform me in writing no later than Friday, December 12, 1980.

If either party anticipates requesting an opportunity to file a post-trial memorandum, please be prepared at the hearing to advise as to the time that will be requested for the submission of such memoranda. While the Committee will be cognizant of the upcoming holidays, it is most anxious that this case be resolved expeditiously.

Sincerely,

/s/ Charles A. Miller
Chairman,
Hearing Committee No. 9

mb

cc: Earl J. Silbert, Esq.
Ms. Linda W. Cropp

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

February 20, 1981

Geoffrey P. Gitner, Esq.
Wadden, Scherr & Krebs
1000 Potomac Street, N.W.
Washington, D.C. 20007

Re: *In the Matter of Richard Allen James*

Dear Mr. Gitner:

In the Respondent's Post-Hearing Memorandum in the above-captioned case, at page 24, it is suggested that Respondent may, in reliance on my prehearing letter of December 9, 1980, suggesting that the issue of appropriate discipline be deferred until liability is determined, have failed to proffer "mitigation" evidence at the December 16 hearing. I did state at the close of the hearing that the issue of discipline should be considered in the post-hearing memoranda and that the Committee intended to resolve all issues at one time. I specifically invited Respondent to offer anything he chose bearing on the question of mitigation in his post-hearing memorandum. (Tr. 204).

Nevertheless, in the interest of assuring a complete record for the Board, the Committee will afford Respondent 15 days from the date of this letter to make any additional showing on the question of mitigation. This opportunity is confined to Respondent's prior record and reputation (Items (b) and (c) at page 24 of your memorandum). It appears to the Committee that Items (a), (d), and (e) in your memorandum were fully

covered in Respondent's testimony and are adequately dealt with in your memorandum.

Please send copies of any further submission to the members of the Committee as well as to Bar Counsel.

Sincerely,

/s/ Charles A. Miller

mb